

Rethinking the Identity and Role of United States Attorneys

Sara Sun Beale*

The reputation and credibility of the Department of Justice were badly tarnished during the Bush administration. This article focuses on concerns regarding the role of partisan politics.¹ Critics charge that during the Bush administration improper partisan political considerations pervasively influenced a wide range of decisions including the selection of immigration judges, summer interns and line attorneys; the assignment of career attorneys to particular details; the evaluation of the performance of United States Attorneys; and the decision whether and when to file charges in cases with political ramifications.

The Inspector General's lengthy and highly critical reports have substantiated some of these charges.² The first two Inspector General (IG) Reports found that the Department improperly used political criteria in hiring and assigning some immigration judges, interns, and career prosecutors.³ The third report

* Charles L.B. Lowndes Professor, Duke Law School, Durham, N.C. I would like to acknowledge the outstanding research assistance provided by Michael Devlin, Meghan Ferguson, Amy Taylor, and Molly Brownfield, and the helpful comments of Norman Abrams, Albert Alschuler, Rachel Barkow, Anthony Barkow, Candace Carroll, Colm Connolly, Ronald Goldstock, Bruce Green, Lisa Kern Griffin, James Jacobs, Susan Klein, Daniel Richman, and Adam Safwat. Of course any errors are my own.

¹ Other serious concerns about the Department have been raised, particularly in connection with its role in the war on terror. For example, the Department has been the subject of intense criticism for legal analysis that led to the authorization of brutal interrogation techniques for detainees. See, e.g., Norman W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 STAN. L. REV. 1931, 1969–70 n.204 (2008) (collecting examples of the “burgeoning literature” on the work of lawyers in the Bush administration who offered formal opinions that purported to confer authority to torture and noting that most of the scholarship is “roundly condemnatory”).

² The reports that I call the Inspector General Reports were prepared jointly by the IG and the Department of Justice Office of Professional Responsibility (OPR). These reports are compiled in AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006 (2008), <http://www.usdoj.gov/oig/special/s0809a/final.pdf> [hereinafter IG REPORT ON REMOVAL OF U.S. ATTORNEYS]; AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL (2008), <http://www.usdoj.gov/oig/special/s0807/final.pdf> [hereinafter IG REPORT ON POLITICIZED HIRING IN OFFICE OF AG]; and AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING IN THE DEPARTMENT OF JUSTICE HONORS PROGRAM AND SUMMER LAW INTERN PROGRAM (2008), <http://www.usdoj.gov/oig/special/s0806/final.pdf> [hereinafter IG REPORT ON HONORS PROGRAM AND SLIP].

³ See IG REPORT ON HONORS PROGRAM AND SLIP, *supra* note 2, at 98 (concluding that in 2002 “the data indicated that the Committee considered political or ideological affiliations when deselecting candidates” for entry level attorney positions and summer internships, and in 2006 “the

recommended that a special prosecutor be appointed to determine whether one U.S. Attorney was removed in an effort to influence voter fraud and corruption prosecutions.⁴ As to the other U.S. Attorney dismissals, the report found that they were done in an astonishingly slipshod fashion with little or no oversight (and no candor during the Congressional and IG investigations), but in general, not for improper reasons.⁵

There has been no resolution of other charges, made in Congressional hearings and in the media, that political considerations improperly influenced the course of other individual prosecutions, and that overall the Department's prosecutions were disproportionately focused on Democratic office holders, party activists, and donors.

The Inspector General has proposed specific responses to some of the problems identified in his reports, but these recommendations go principally to the hiring and assignment of immigration judges, summer interns, and career attorneys.⁶ Those are the easy issues because there is considerable agreement that politics should play no role at all in decisions concerning career and nonpartisan positions. The only challenge is to make sure that this principle is reiterated and enforced.

The more difficult issue concerns the proper role of politics at the level of the U.S. Attorneys. The position of U.S. Attorney is, in a formal sense, plainly political: U.S. Attorneys are appointed by the president with the advice and consent of the Senate,⁷ and they serve at the president's pleasure.⁸ Once selected, however, U.S. Attorneys are expected to leave behind partisan politics, adhering to

Screening Committee inappropriately used political and ideological considerations to deselect many candidates"); IG REPORT ON POLITICIZED HIRING IN OFFICE OF AG, *supra* note 2, at 135–37 (finding political considerations were used to evaluate candidates for certain career positions, including AUSA positions, and in the selection or approval of career attorney candidates for temporary details, and that the "most systematic use of political or ideological affiliations occurred" in the selection of immigration judges).

⁴ IG REPORT ON REMOVAL OF U.S. ATTORNEYS, *supra* note 2, at 186–200, 357–58 (recommending that an independent counsel be appointed to investigate the removal of U.S. Attorney David Iglesias to determine whether there were attempts to pressure him to accelerate his charging decision in a corruption case or to initiate voter fraud investigations to affect the outcome of an election, and to determine whether criminal conduct, including false statements and obstruction of justice, had occurred).

⁵ *Id.* at 325, 356–58 (stating that removal process was "fundamentally flawed," conducted in a fashion that was "unsystematic and arbitrary . . . with little oversight," and noting that Congressional testimony and statements by the Attorney General and other Department officials were "inconsistent, misleading, and inaccurate in many respects").

⁶ IG REPORT ON HONORS PROGRAM AND SLIP, *supra* note 2, at 101–02 (recommending revision of internal manuals, statements, and orders; additional briefing of political appointees; and increased vigilance to ensure that political affiliations are not used as a criteria for evaluating candidates).

⁷ 28 U.S.C. § 541(a) (2006).

⁸ 28 U.S.C. § 541(c) (2006).

the norm of prosecutorial neutrality. In this context, prosecutorial neutrality means, at a minimum, that the decision whether and when to bring charges in individual cases should be made without regard to either the political affiliation of the individuals involved or the resulting benefit (or harm) to either political party.⁹ But one might argue that U.S. Attorneys who are selected by an overtly political process and supervised by other political actors will naturally be influenced in their decisions whether and when to prosecute, and that they will be likely to bring cases to embarrass or disable political opponents, but fail to bring charges against officials in their own party or their supporters. Some critics think that is exactly what occurred during the Bush administration, and during earlier administrations as well.¹⁰ Moreover, the nature of contemporary federal criminal law magnifies the potential for mischief, because the definitions of the relevant offenses are both broad and vague, giving the prosecutors extraordinarily wide discretion on which there are few checks.¹¹

The current structure and the problems encountered during the Bush administration raise the question whether the role of the U.S. Attorney should be reconceptualized. If partisan political considerations should not influence prosecutorial decisions, why not insulate the position of U.S. Attorney from politics by redefining it as a nonpartisan career appointment? There are structural reasons to think that this would be desirable because it would place the Justice Department's structure in rough parity with that of other cabinet departments and reduce the strain on the confirmation process at the beginning of a new presidential administration. The strain on the confirmation process could also be reduced by recharacterizing the U.S. Attorneys as political appointees not subject to Senate confirmation. The current structure of the Justice Department is anomalous. In comparison with other agencies, the Department has a disproportionate number of presidential appointees subject to Senate confirmation. During the Bush administration from 2001 to 2008, the Senate confirmed 134 appointees to positions in the Justice Department, including the U.S. Attorneys for the 93 federal judicial districts.¹² In comparison, during the same period the Departments of Treasury and Defense each had fewer than 30 presidential appointees confirmed by

⁹ For a general discussion of the various elements of prosecutorial neutrality and the difficulty of applying that concept, see Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837. See also *id.* at 869 (stating that one element of prosecutorial neutrality is nonpartisanship, which "encompasses both avoiding obligations to the political parties with which they are affiliated (and which may have helped them obtain their positions) and holding themselves above public outcry and frenzy about particular cases").

¹⁰ See *infra* Part I.C and text accompanying notes 272–73.

¹¹ See *infra* Part II.C.2.

¹² Memorandum from Amy Taylor, Reference Librarian, Duke Law Library, to Professor Sara Sun Beale, Duke Law Sch. 1 (Oct. 29, 2008) (on file with author) (noting that as of Oct. 29, 2008, there had been 147 nominations and 134 confirmations for the Department of Justice, excluding nominations of judges and U.S. marshals, which are attributable to the Department for some purposes).

the Senate, though both have more employees than the Justice Department.¹³ The Department of State's numbers were comparable to those of the Justice Department, but that reflects the inclusion of all ambassadors.¹⁴ Indeed, I am not aware of any agency other than the Justice Department in which the head of each small domestic field office is a presidential appointee subject to Senate confirmation.

The presidential appointment of the U.S. Attorneys tends to reinforce a degree of autonomy for the U.S. Attorneys' Offices in each district, and this article also explores a distinct but closely related issue: the appropriate degree of centralization of authority within the Department of Justice.

This article first sets forth an account of the problems disclosed by the IG's report and related congressional investigations, and then explores the historical development of the role of the U.S. Attorneys, their relationship to the Attorney General and the Department of Justice, and the role they play in the contemporary federal criminal justice system. With that background in mind, I return to the question whether it would be desirable to alter the character of the position. I conclude that, on balance, converting the U.S. Attorneys to a career civil service role is neither politically feasible nor desirable. No one doubts that the Attorney General and the heads of the divisions within the Department (which I will refer to collectively as the leadership of "Main Justice") are and will always be political appointees. The appointment of these officials is the mechanism by which each new presidential administration establishes and carries out its policies and priorities. As long as the U.S. Attorneys remain subject to the oversight and direction of the political leadership at Main Justice, it will not be possible to preclude entirely the possibility that political considerations might improperly influence decisions in individual prosecutions. Nor would it be desirable to eliminate the requirement of Senate confirmation for U.S. Attorneys.

The current appointment process for U.S. Attorneys has several advantages. It creates a desirable counterweight to Main Justice in two distinct ways. First, it provides a political counterweight, because the U.S. Attorneys have their own political influence and constituencies. Second, because the U.S. Attorneys are political figures drawn from their districts and confirmed with the support of their home-state senators, they also serve as a counterweight to excessive centralization and uniformity within the federal system. There is real value in a structure that delegates federal prosecutorial power to local districts, reinforcing federalism and allowing federal law to be adapted to different conditions. The current system also

¹³ *Id.* at 2 (noting that during the same period the Treasury Department had 25 nominations and 25 confirmations, and the Department of Defense had 28 nominations and 27 confirmations). Between 2001 and 2006, the average number of employees in each department was as follows: 107,146 in the Justice Department, 114,574 in the Treasury, and 604,758 in the Department of Defense. *Id.* at 3–5.

¹⁴ *Id.* at 1–2 (noting that the Department of State had 228 confirmations, including 153 ambassadors, during the same period; State had a total of 259 nominations, including 181 ambassadors and 78 other nominations).

has several other major advantages. A presidential appointment gives the U.S. Attorney desirable prestige that helps him or her carry out the federal law enforcement mission and it increases the accountability of the U.S. Attorneys. Bringing in an outsider may also increase the fairness and accuracy of federal prosecuting by reducing institutional tunnel vision. I am agnostic on the final issue which system would attract the stronger candidates to the position.

Although the advantages of maintaining the current model of the U.S. Attorney as a presidential appointee outweigh the disadvantages, there are still reasons for concern. Accordingly, I argue that serious consideration should be given to mechanisms that would moderate the effect of partisan politics at the appointment stage, and mechanisms to help insulate U.S. Attorneys from improper partisan pressures that may arise from within the executive branch, from Congress, or from local political leaders.

Section I of this article provides background on recent events that suggest the nature of the problem. Section II describes the history and contemporary role of the U.S. Attorney. Section III describes the political complexity of the current appointments process. Section IV considers the options for reform. Two possible objections could be made to undertaking this analysis. First, fundamental change is unlikely, because it would diminish the power of the president and the Senate, both of which must concur to amend the legislation governing the selection and removal of U.S. Attorneys. And second, the political corruption cases that are at the center of this analysis are only a small fraction of the federal criminal caseload. Despite the enormous political obstacles, I believe it is important to take seriously the option of restructuring the role of the U.S. Attorney to reduce the danger of improper partisan influence, while at the same time taking into account the broader ramifications of such a change. The unprecedented power now wielded by federal prosecutors has heightened the stakes, making it imperative to look with a fresh eye at the structure that governs federal prosecutions. And even though federal prosecutions for political corruption make up only a small portion of the federal caseload, they perform a critical function, policing the integrity of the government at the federal, state, and local levels. It may be true that no fundamental change will occur in the absence of a scandal or some other major shock to the system, but such scandals have occurred in the past and may occur again. One of the questions examined in Part I of this article is whether events during the Bush Administration demonstrate the need for such fundamental change.

Although the IG reports, Congressional investigations, and my review of the evolution of the federal system provide a rich basis against which to consider these issues, I note with regret the lack of any empirical research assessing the impact of the selection process for U.S. Attorneys.

I. SIGNS OF A NEED FOR REFORM?

Recent events have shone a spotlight on concerns about the exercise of prosecutorial discretion in the federal system, providing rich background against

which to assess the need for reform. These events include the removal of nine U.S. Attorneys, changes in the procedure for appointing interim U.S. Attorneys, and evidence that partisan motivations may have influenced politically sensitive prosecutions.

A. *The United States Attorney Firings*

The firing of nine U.S. Attorneys in 2006 sparked a public firestorm that prompted both Congress and the IG to investigate.¹⁵ Although both Congress and the IG considered the circumstances surrounding each of the cases, I will focus on four that are illustrative of the key issues raised by the current system of appointing and removing U.S. Attorneys: David Iglesias, Todd Graves, Bud Cummins, and Carol Lam.

1. David Iglesias

The IG found that the most serious allegations concerned the removal of David Iglesias, who served as U.S. Attorney in New Mexico.¹⁶ The IG report concluded “with reasonable assurance that the complaints from New Mexico Republican politicians and party activists about Iglesias’ handling of voter fraud and corruption cases were the reasons for his removal as U.S. Attorney.”¹⁷ In his Congressional testimony Iglesias expressed his own belief that he was asked to resign because he failed to respond to political pressure to indict before the 2006

¹⁵ See, e.g., Todd J. Gillman, *Embattled AG Gonzales Resigns*, DALLAS MORNING NEWS, Aug. 28, 2007, available at 2007 WLNR 16775486 (reporting attorney general’s resignation and relating it to the “the uproar over the bungled, politically charged firings of eight U.S. Attorneys”); Amy Goldstein & Dan Eggen, *Senators Deride Justice Reassignments: Prosecutor Firings and Staff Decisions Draw Hill Criticism*, WASH. POST, June 22, 2007, at A3 (discussing the Senate reaction to the U.S. Attorney firings and allegations of partisan hiring practices); Amy Goldstein & Dan Eggen, *Voter-Fraud Complaints Drove Dismissals*, WASH. POST, May 14, 2007, at A4 (discussing allegation that the actions of the fired U.S. Attorneys with regard to voter fraud cases were factors in the firings, especially that of David Iglesias); Tom Hamburger, *A Targeted Prosecutor, a Pattern*, L.A. TIMES, May 31, 2007, at 1 (describing “backlash among some Minnesota Republicans” and their calls for attorney general’s resignation “largely as a result of the U.S. attorney firings” and revelations about pressures on local U.S. Attorney concerning Indian voting rights); Jennifer Sullivan, *Sullivan Picked to Keep Serving as U.S. Attorney*, SEATTLE TIMES, Sept. 27, 2007, at B1 (noting “uproar” over the firing of local U.S. Attorney and others “led to congressional hearings, and U.S. Attorney General Alberto Gonzales eventually resigned”); Andrew Zajac, *Pointing the Way For Prosecutors: Under Fire, Not In Retreat*, CHI. TRIB., June 17, 2007, at 4 (describing “political crisis over the firing of nine U.S. attorneys, a rare potential vote of no-confidence in the Senate and numerous calls for [the attorney general’s] resignation, and criticizing his response as “tightening the leash on the men and women who prosecute federal crimes across the nation”).

¹⁶ IG REPORT ON REMOVAL OF U.S. ATTORNEYS, *supra* note 2, at 149–200 (discussing circumstances of Iglesias’ removal).

¹⁷ *Id.* at 197.

election.¹⁸ He described receiving calls from both Senator Domenici and Representative Wilson regarding the status of a pending corruption matter and stated that in both instances he felt that he was being pressured to bring an indictment before the November election.¹⁹ After the Domenici call he “felt ill,” because he “believed Domenici had asked for confidential information about an ongoing investigation, and that Iglesias would pay in some way for refusing to cooperate with him.”²⁰ Domenici admitted calling Iglesias but denied any improper intent.²¹ Senator Domenici also made multiple calls to the Attorney General and to the Deputy Attorney General complaining about Iglesias’ performance.²² Additionally, Iglesias received pressure on multiple occasions from local Republican officials demanding action on voter fraud before the elections.²³ Domenici and state Republican leaders also complained about Iglesias to the various officials in the White House, including Karl Rove.²⁴

The IG report concludes that the facts uncovered to date may establish criminal conduct as well as pressure on Iglesias to violate Departmental regulations and/or professional standards. In the IG’s view, an attempt to pressure a prosecutor to accelerate the filing of political corruption charges or to initiate voter fraud investigations for the purposes of affecting the outcome of an upcoming election would clearly be improper and might constitute a crime.²⁵ Moreover, under both departmental regulations and professional standards, Iglesias had a duty to prosecute cases without regard to partisan political considerations.²⁶ Departmental regulations, which are intended to shield prosecutors from improper political pressures, also require that any requests from members of Congress to

¹⁸ *Id.* at 152.

¹⁹ *Id.* at 152. *See also id.* at 159–60 (describing Rep. Wilson’s 2004 letter to Iglesias complaining about what she perceived to be voter fraud in her district and Wilson’s dissatisfaction with his response).

²⁰ *Id.* at 179.

²¹ Domenici admitted making the call and also recommending Iglesias’ removal, but he denied pressuring or threatening Iglesias. The Senate Select Committee on Ethics investigated the call and issued a Public Letter of Qualified Admonition to the Senator. *Id.* at 180–81. The letter stated that the call created an appearance of impropriety, but that the investigation had found “no substantial evidence to determine that [Domenici] attempted to improperly influence an ongoing investigation.” *Id.* at 181.

²² *Id.* at 168–70, 174–75, 179–81.

²³ *Id.* at 158–59, 161–62, 164.

²⁴ *Id.* at 165–66, 172–74, 190.

²⁵ *Id.* at 199–200 (suggesting that such pressure could constitute obstruction of justice or wire fraud).

²⁶ *See* U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL §§ 9-27.000 & 9-27.260(A)(3) [hereinafter USAM]; ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION 3-1.3(f) (3d ed. 1993) (prosecutor’s professional judgment should not be influenced by his or her political interests); *id.* at 3-3.9(d) (in making decision to prosecute, “prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved”).

U.S. Attorneys' Offices for confidential information must be promptly reported, but Iglesias failed to report the calls by Domenici and Wilson.²⁷ Finally, the IG noted that other criminal conduct—such as false statements to Congress or the IG investigators—may have occurred during the investigation of Iglesias' removal.²⁸

The IG was unable to uncover the full factual record because some key witnesses—including Karl Rove, Harriet Miers, and Senator Domenici—refused to be interviewed, and critical documents were not made available.²⁹ Indeed, the record does not establish whether the individuals who sought Iglesias' removal were acting solely on the belief that he was not competently prosecuting worthwhile cases or for the purpose of influencing the upcoming elections.³⁰ Accordingly, the IG recommended the appointment of a special counsel to continue the investigation,³¹ and the Attorney General accepted this recommendation, appointing a special prosecutor to complete the investigation of the removal of Iglesias and related matters.³²

Given the facts reported by the IG, the Iglesias case reveals the potential for partisan pressures to be exerted on U.S. Attorneys from multiple sources. Some of the pressure on Iglesias came directly from Congress and, particularly, from Senator Domenici, upon whose influence and patronage Iglesias had relied. Iglesias regarded Senator Domenici as his "mentor."³³ Indeed, before Iglesias became U.S. Attorney, he met with Senator Domenici at an Albuquerque restaurant for what Iglesias later described as "a kiss-the-ring ceremony that gave

²⁷ IG REPORT ON REMOVAL OF U.S. ATTORNEYS, *supra* note 2, at 194–95 (citing USAM § 1-8.010).

²⁸ *Id.* at 198. The White House has also asserted executive privilege to block the Congressional investigation. See *infra* note 70 and accompanying text.

²⁹ IG REPORT ON REMOVAL OF U.S. ATTORNEYS, *supra* note 2, at 153–54. In March 2009 the chairman of the House Judiciary Committee reportedly negotiated an agreement under which Rove and Miers would give depositions under oath, though they would not testify in public. Susan Crabtree, *Rove, Conyers Reach Deal on Testimony*, THE HILL, Mar. 4, 2009, <http://thehill.com/leading-the-news/rove-conyers-reach-deal-on-testimony-2009-03-04.html>.

³⁰ IG REPORT ON REMOVAL OF U.S. ATTORNEYS, *supra* note 2, at 199.

³¹ *Id.* at 198.

³² Attorney General Michael Mukasey appointed Nora Dannehy, Acting United States Attorney in Connecticut, "to conduct further investigation as needed, and ultimately to determine whether any prosecutable offense was committed with regard to the removal of a U.S. Attorney or the testimony of any witness related to the U.S. Attorney removals." Press Release, Statement by Attorney General Michael B. Mukasey on the Report of an Investigation into the Removal of Nine U.S. Attorneys in 2006 (Sept. 29, 2008), available at <http://www.usdoj.gov/opa/pr/2008/September/08-opa-859.html>. Mukasey said that Dannehy would exercise the authority of the United States Attorney for the District of Columbia for purposes of this matter and report to him through the Deputy Attorney General. *Id.* See also Eric Lichtblau & Sharon Otterman, *Special Prosecutor Named in Attorney Firings Case*, N.Y. TIMES, Sept. 30, 2008, <http://www.nytimes.com/2008/09/30/washington/30attorney.html?partner=rssnyt&emc=rss> (describing Dannehy's background and the events leading up to appointment).

³³ DAVID IGLESIAS WITH DAVIN SEAY, IN JUSTICE: INSIDE THE SCANDAL THAT ROCKED THE BUSH ADMINISTRATION 52 (2008).

[him] the go-ahead to pursue [his] ambitions according to Domenici's wisdom and wishes."³⁴ Local Republican politicians and party activists also sought to influence Iglesias directly. Pressure was also channeled through the White House and the senior leadership in the Department, which received complaints about Iglesias from state party leaders as well as Domenici and Wilson. Indeed, although Iglesias served at the pleasure of the president, he recognized that he also had to contend with political forces generated in New Mexico.³⁵

As recognized in the IG report, Iglesias' removal also spotlights the inevitable difficulty in separating improper partisan motivations from proper support for bringing well-founded cases involving political corruption or voter fraud by members of the political party that does not control the executive branch.

2. Todd Graves

The IG also found that political pressure from the home-state senator was the reason for the forced resignation of a second U.S. Attorney, Todd Graves, who served as U.S. Attorney in the Western District of Missouri.³⁶ In Graves's case, however, the IG concluded that the pressure was unrelated to the work of the U.S. Attorney's Office. Graves, whose brother was a Missouri congressman, earned the ire of Senator Christopher "Kit" Bond's staff when he refused to become involved in a dispute between the staffs of the senator and the congressman.³⁷ In his interview with the IG, the former U.S. Attorney confirmed the "friction" between the congressional and senatorial staffs, his refusal to use his influence to have the congressman's chief of staff fired, and that he was informed by Bond's staff that as a result "they could no longer protect [his] job."³⁸

The IG found it troubling that the Department of Justice made no effort in Graves's case to protect the "independence of federal prosecutors, by ensuring that otherwise effective U.S. Attorneys are not removed for improper political reasons."³⁹ Indeed, little, if any, effort was made by Departmental officials even to determine the reasons for the pressure from Bond's staff for Graves's removal.⁴⁰

3. Bud Cummins

The IG concluded that the main reason H. E. "Bud" Cummins III was asked to resign from his position as U.S. Attorney for the Eastern District of Arkansas

³⁴ *Id.*

³⁵ *Id.* at 53 ("To assume that being U.S. Attorney, at that time and in that state, would not come with any political baggage would be like walking right into a minefield.").

³⁶ IG REPORT ON REMOVAL OF U.S. ATTORNEYS, *supra* note 2, at 99–114.

³⁷ *Id.* at 105–08, 111–14.

³⁸ *Id.* at 108.

³⁹ *Id.* at 113.

⁴⁰ *Id.*

was to open up a position for a former White House official.⁴¹ Deputy Attorney General Paul McNulty testified to Congress that Cummins was dismissed solely to make way for Tim Griffin, a former aide to senior White House official Karl Rove.⁴² The Attorney General's Chief of Staff, Kyle Sampson, said in e-mail that it was "important to . . . Karl" that Griffin have the position of U.S. Attorney in the Eastern District of Arkansas.⁴³ Although some Departmental officials had suggested that Cummins was removed because of his weak performance, the IG found this claim to be unsupported.⁴⁴ To the contrary, the director of the Executive Office of United States Attorneys had just visited Cummins' district and found it performing at a high level.⁴⁵

The Cummins case demonstrates the effect of the principle that as political appointees, the U.S. Attorneys serve at the pleasure of the President and may be removed for any reason, including the President's decision to appoint another person to the position. It is also of interest because Kyle Sampson, the Attorney General's Chief of Staff, recommended using new statutory authority to bypass the Senate confirmation process, appointing Griffin for an indefinite "interim" term that would continue for the last two years of the President's term.⁴⁶ Upon learning of continued opposition from Arkansas Senator David Pryor, Griffin withdrew from consideration for the permanent U.S. Attorney position.⁴⁷ The process for appointing interim U.S. Attorneys during this period is discussed below.

4. Carol Lam

The forced resignation of Carol Lam, who served as U.S. Attorney for the Southern District of California, raised concern that she had been removed because of her aggressive pursuit of political corruption by Republican office holders and lobbyists. Lam successfully prosecuted former Republican Congressman Randy "Duke" Cunningham and had announced plans to pursue the former Executive Director of the CIA in connection with the case.⁴⁸ She had also begun an investigation of Republican Congressman Jerry Lewis following the disclosure that one of his staff aides became a lobbyist and arranged earmark contracts worth hundreds of millions.⁴⁹

⁴¹ *Id.* at 115, 147.

⁴² *Id.* at 136.

⁴³ *Id.* at 138.

⁴⁴ IG REPORT ON REMOVAL OF U.S. ATTORNEYS, *supra* note 2, at 142–45.

⁴⁵ *Id.* at 126.

⁴⁶ See *infra* text accompanying notes 59–69.

⁴⁷ IG REPORT ON REMOVAL OF U.S. ATTORNEYS, *supra* note 2, at 140.

⁴⁸ See John McKay, *Train Wreck at the Justice Department: An Eyewitness Account*, 31 SEATTLE U. L. REV. 265, 285–86 (2008).

⁴⁹ Editorial, *Politics and the Corruption Fighter*, N.Y. TIMES, Jan. 18, 2007, at A26.

Although critics noted that Kyle Sampson proposed Lam's removal immediately after she announced plans to extend her investigation beyond Cunningham,⁵⁰ the IG found "no evidence" that the prosecution or investigation of Republicans "had anything to do with" her removal.⁵¹ Instead, the IG concluded that Lam was removed because of her failure to adhere to the President's and Department's priorities by bringing an insufficient number of gun and immigration cases.⁵² The IG also found that in 2004, 2005, and 2006, members of Congress publicly criticized Lam's record on immigration cases.⁵³ Although some of the complaints came from individual members, in 2004 fourteen members wrote the Attorney General to criticize her office's response to alien smuggling, and nineteen members wrote to the President a year later.⁵⁴ The issue was also raised when the Attorney General testified in a House oversight hearing.⁵⁵ Lam acknowledged to departmental officials that her numbers were lower than those of other border districts but attributed the difference to her policy of prosecuting a smaller number of more serious cases that required more resources and resulted in longer sentences.⁵⁶

Although attributing Lam's dismissal to her failure to adhere to the Administration's priorities, the report noted other "troubling" aspects of her case; despite the fact that Lam's performance was otherwise exemplary, officials in Main Justice never seriously examined her explanations for the low number of prosecutions in her office, nor did they discuss with her the need to improve these statistics or face removal.⁵⁷

⁵⁰ The day after Lam's announcement, Sampson wrote to White House Counsel about "[t]he real problem we have right now with Carol Lam that leads me to conclude that we should have someone ready to be nominated on 11/18, the day her 4-year term expires." E-mail from Kyle Sampson, Chief of Staff to Alberto Gonzales, to William Kelley, Deputy Assistant to the President and Deputy Counsel (May 11, 2006), available at <http://www.talkingpointsmemo.com/docs/lam-emails>.

⁵¹ IG REPORT ON REMOVAL OF U.S. ATTORNEYS, *supra* note 2, at 285. Indeed, the IG noted that "the investigation and prosecution of Cunningham and Foggo [the CIA official] were aggressively pursued by career prosecutors in Lam's office, both during and after her tenure." *Id.*

Sampson told Congress that the "problem" to which he referred in the e-mail was not related to the ongoing Cunningham matter. *U.S. Senate Judiciary Committee Holds a Hearing on U.S. Attorney Firings*, WASH. POST, Mar. 29, 2007 (testimony of Kyle Sampson, in response to questions from Sen. Feinstein), http://media.washingtonpost.com/wp-srv/politics/documents/sampson_transcript032907.html.

⁵² IG REPORT ON REMOVAL OF U.S. ATTORNEYS, *supra* note 2, at 272–73.

⁵³ *Id.* at 277.

⁵⁴ *Id.* at 277–78.

⁵⁵ *Id.* at 278.

⁵⁶ *Id.* at 281.

⁵⁷ *Id.* at 286 (noting that Lam's office had received a positive EARS evaluation, and that she had been described by Associate Deputy Attorney General Margolis as "otherwise 'outstanding,' 'tough,' and 'honest'").

Given the lack of notice to Lam of the seriousness of her failure to increase gun and immigration prosecutions, her high-profile prosecution of corrupt Republican office holders, and the timing of her forced removal, her case was seen—not without some justification—as an example of what would happen to U.S. Attorneys who failed to toe the line and be what some called “loyal Bushies.” Particularly in light of the Department’s failure to provide a coherent and credible account of the reason for the various dismissals, Lam’s removal created the appearance of improper partisan influence.

Lam’s case also illustrates several other significant issues. First, based upon the IG’s report, this was the clearest example of the removal of a U.S. Attorney as a means of enforcing the priorities of the President and the political leadership of the Department. Lam’s replacement contributed to a more uniform national approach, but it did so by overriding a policy that was arguably tailored to meet the needs of an individual district. The district’s statistics on immigration cases were low precisely because Lam had adopted a policy of devoting significant resources to immigration cases, but using them to bring a smaller number of more serious, resource-intensive cases. Her removal can thus be seen as an example of the tension between uniform national policies and those tailored to individual districts. It is worth noting that the political leadership in the Department never seriously considered Lam’s approach or gave her an opportunity to make a case for it.⁵⁸ Finally, the Lam case demonstrates that in some cases, members of Congress, individually and collectively, take a keen interest in the activities of individual U.S. Attorneys.

B. *The Interim U.S. Attorney Loophole*

As noted above, Kyle Sampson proposed that Tim Griffin (the replacement for Bud Cummins) be nominated as interim U.S. Attorney and serve without Senate confirmation for the last two years of President Bush’s term. Sampson sought to exploit an obscure provision, enacted in the March 2006 Patriot Act reauthorization regarding the appointment of interim U.S. Attorneys, to bypass Senate confirmation altogether. Whereas previously, an interim U.S. Attorney selected by the Attorney General could only serve 120 days before the district court appointed an interim U.S. Attorney,⁵⁹ the new provision provided that an interim appointed by the Attorney General could serve indefinitely, without nomination by the President or confirmation by the Senate.⁶⁰ The legislation was

⁵⁸ A summer intern was assigned to evaluate Lam’s approach but lacked the necessary expertise and failed to complete the assignment. *Id.* at 282.

⁵⁹ The 120-day limit on the term of acting U.S. Attorneys was set in 1986. *See* Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646, § 69, 100 Stat. 3616-17 (1986) (amended 2006). Before that, 28 U.S.C. § 546 (1982) authorized the district court to fill a vacancy with an acting U.S. Attorney until the President appointed a person with the advice and consent of the Senate.

⁶⁰ *See* USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, §

added quietly, with no discussion, to the bill at the Department's request by a staffer on the Senate Judiciary Committee, Brett Tollman, who was himself later appointed U.S. Attorney in Utah.⁶¹

In an e-mail, Kyle Sampson, the Attorney General's chief of staff, stated that "I strongly recommend that as a matter of Administration policy, we utilize the new statutory provisions that authorize the AG to make appointments," because by bypassing the confirmation process "we can give far less deference to home-state Senators and thereby get (1) our preferred person appointed and (2) do it faster and more efficiently, at less political cost to the White House."⁶² Referring to objections from the Arkansas senators, Sampson wrote "we should 'gum this to death' . . . and 'run the clock' while appearing to be acting in 'good faith' by asking the Senators for their recommendations, interviewing other candidates, and pledging to desire a Senate-confirmed U.S. Attorney."⁶³

The Attorney General told the IG that he did not support Sampson's plan to bypass the confirmation process, and the IG "did not find evidence" to the contrary.⁶⁴ Although Sampson himself later sought to minimize his e-mails as just a bad idea at the staff level, the IG notes that Sampson advocated the plan, began to implement it, and abandoned it only after determined opposition from Senator Pryor as well as the controversy surrounding the U.S. Attorney firings.⁶⁵ In fact, critics charge that the political leadership at the Department of Justice relied upon the Patriot Act authority to generate its own list of replacements for the fired U.S. Attorneys rather than deferring to the recommendations of home-state Senators, as is traditional, and that it relied upon this authority to appoint approximately twenty interim U.S. Attorneys.⁶⁶ These interim U.S. Attorneys had less authority to hire career prosecutors for their offices than their presidentially appointed and senatorially confirmed peers.⁶⁷ The Department's White House Liaison, Monica Goodling, assumed the responsibility of hiring new Assistant United States Attorneys (AUSAs) in offices with interim U.S. Attorneys, and the IG found in a separate report that Goodling's hiring decisions turned on partisan considerations.⁶⁸

502, 120 Stat. 192 (2006).

⁶¹ See Daniel Richman, *Federal Sentencing in 2007: The Supreme Court Holds—The Center Doesn't*, 117 YALE L.J. 1374, 1391 (2008).

⁶² IG REPORT ON REMOVAL OF U.S. ATTORNEYS, *supra* note 2, at 130.

⁶³ *Id.* at 133.

⁶⁴ *Id.* at 147.

⁶⁵ *Id.* at 146–47.

⁶⁶ James Eisenstein, *The U.S. Attorney Firings of 2006: Main Justice's Centralization Efforts in Historical Context*, 31 SEATTLE U. L. REV. 219, 248 (2008) [hereinafter Eisenstein, *U.S. Attorney Firings*].

⁶⁷ See *id.* at 256 n.113; IG REPORT ON POLITICIZED HIRING IN OFFICE OF AG, *supra* note 2, at 25–26.

⁶⁸ IG REPORT ON POLITICIZED HIRING IN OFFICE OF AG, *supra* note 2, at 25–46. See also

In the wake of the controversy over the firings, Congress restored the 120-day limit with the Preserving United States Attorney Independence Act of 2007, which President Bush signed on June 14, 2007.⁶⁹

Although the scheme to exploit the Patriot Act authority was short lived, it highlights the degree to which the requirement of Senate confirmation imposes real limitations on the president's choices for the post of U.S. Attorney, forcing the president to take account of preferences in the Senate and especially those of home-state senators. It also emphasizes another aspect of the normal independence of U.S. Attorneys, their ability to hire the AUSAs of their own choice, rather than candidates preferred by officials in Main Justice.

C. Evidence of Partisan Influences on Prosecutorial Discretion

The dismissals of U.S. Attorneys David Iglesias and Carol Lam, discussed above, show the danger that U.S. Attorneys may face explicit pressure to exercise prosecutorial discretion in a manner that advances partisan political goals, or may fear removal if their prosecutorial decisions do not in fact advance such goals. Although it appears that neither Iglesias nor Lam succumbed to such pressure, critics charge that in other instances prosecutorial discretion in the federal system has been tainted by partisan considerations. These claims are the subject of an ongoing investigation by the House Committee on the Judiciary Committee. The Committee has heard from critics of the administration, but the assertion of executive privilege has prevented the Committee from obtaining testimony and documentary evidence from past and present officials in the White House.⁷⁰ The discussion below is based upon the October 2007 congressional hearing⁷¹ and the

Eisenstein, *supra* note 66, at 255–57 (describing Goodling's hiring practices).

⁶⁹ See Preserving United States Attorney Independence Act of 2007, Pub. L. No. 110-34, § 3, 121 Stat. 224 (2007).

⁷⁰ The Committee has subpoenaed Harriet Miers (former counsel to the president), Josh Bolton (the president's chief of staff), and Karl Rove, all of whom have refused to appear on the grounds of executive privilege. The House of Representatives voted to hold Miers and Bolton in contempt of Congress and passed a resolution authorizing litigation to enforce compliance with the subpoena. See Resolution Recommending that the House of Representatives Find Harriet Miers and Joshua Bolton, Chief of Staff, White House, in Contempt of Congress for Refusal to Comply With Subpoenas Duly Issued by the Committee on the Judiciary, H.R. Res. 110-423, 110th Cong. (2007), available at <http://judiciary.house.gov/hearings/pdf/ContemptReport071105.pdf>. See also Committee on the Judiciary v. Harriet Miers, 542 F.3d 909 (D.C. Cir. 2008) (describing action in Congress leading to litigation). Although the district court ordered Miers and Bolton to comply with the subpoena, the court of appeals granted a stay pending appeal and denied the motion for expedition, indicating that it would be beneficial to have the views of a new President and new House of Representatives. *Id.* An agreement has reportedly been reached for Rove and Miers to give deposition testimony under oath. See *supra* note 29.

⁷¹ *Allegations of Selective Prosecution: The Erosion of Public Confidence in our Federal Justice System: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. (2007) [hereinafter *House Hearing on Allegations of Selective Prosecution*].

report prepared by the Majority Staff of the House Committee on the Judiciary,⁷² as well as other publicly available materials.

The evidence presented by critics at congressional hearings and in related investigations falls into two categories: statistical evidence and evidence concerning individual prosecutions. Since there has been no resolution of these charges, which remain under investigation, they stand on a different and weaker footing than the IG's report.

1. Statistical disparity

Professor Donald Shields of the University of Missouri presented statistical data on political corruption investigations during the Bush Administration. Shields testified to Congress in 2007 regarding an eight-year longitudinal study he conducted on, what he described as federal political profiling of federal, state, and local political officeholders.⁷³ His study tracked more than 800 political corruption investigations led by U.S. Attorneys under Attorneys General Ashcroft and Gonzales. Shields concluded that the disparity between investigations of Democrats versus Republicans was statistically significant beyond the .0001 level.⁷⁴ Although only fifty percent of elected officials in the United States reported being Democrats during the period in question, Shields found that eighty percent of those investigated by the Bush Administration were Democrats.⁷⁵

The Shields study has not been peer-reviewed and is subject to very significant limitations. First, although Shields testified that his research demonstrates "political profiling" and "selective investigation and prosecution [rates],"⁷⁶ he analyzed only the reports of investigations that appeared in national and local television and newspaper accounts or in federal press releases.⁷⁷ Thus his study does not include investigations that were not publicized (or that escaped his search terms⁷⁸), and it does not separate investigations that led to charges from

⁷² MAJORITY STAFF OF H.R. COMM. ON THE JUDICIARY, 110th CONG., ALLEGATIONS OF SELECTIVE PROSECUTION IN OUR FEDERAL CRIMINAL JUSTICE SYSTEM 1 (Comm. Print 2008) (prepared for Chairman John Conyers, Jr.), available at <http://www.folo.us/wp-content/uploads/2008/04/house-judish-majority-staff-report.pdf> [hereinafter HOUSE STAFF REPORT].

⁷³ *House Hearing on Allegations of Selective Prosecution*, *supra* note 71, at 226–70 (written statement by Prof. Donald Shields entitled "An Empirical Examination of the Political Profiling of Elected Officials: A Report on Selective Investigations and/or Indictments by the DOJ's Attorneys under Attorneys General Ashcroft and Gonzales").

⁷⁴ *Id.* at 225 (testimony of Prof. Shields), 230 (written statement of Prof. Shields).

⁷⁵ *Id.* at 224 (testimony of Prof. Shields), 268 (table 2). In comparison, forty-one percent were Republicans, and nine percent reported themselves to be Independent or Other. *Id.*

⁷⁶ *Id.* at 225 (testimony of Prof. Shields).

⁷⁷ *Id.* at 224 (testimony of Prof. Shields), 228–29 (written statement of Prof. Shields, describing his project as a "political communication study" rather than a "legal study").

⁷⁸ For a description of the search methodology and some of its limitations, see *id.* at 229–30 (written statement of Prof. Shields).

those that did not. Shields focused on press and news reports because there is no publicly available database of all federal investigations, but he also suggested that the pattern of prosecutions publicized by the Department is independently significant because of its political effects.⁷⁹ Additionally, the Shields study seems to imply that U.S. Attorneys chose the subjects of their investigations, though they commonly rely upon referrals from investigating agencies, such as the F.B.I.⁸⁰

Although the Shields study is flawed, using a different methodology that avoids these problems, Sanford Gordon found evidence suggesting partisan bias in prosecutions in both the Clinton and Bush Administrations.⁸¹ Gordon's study, though promising, is still a working paper.

2. Individual prosecutions

The House Judiciary Committee's investigation into selective prosecution has focused principally on allegations of partisan motives in five individual prosecutions, though additional cases have also been referenced briefly.⁸² The two most prominent cases are those of Don Siegelman and Georgia Thompson.

a. Don Siegelman

The first prosecution of former Alabama Governor Don Siegelman during the Bush administration ended on the second day of trial, when the court dismissed the case with prejudice.⁸³ Siegelman was indicted in 2005 on new charges of federal

⁷⁹ See *id.* at 228 (written statement of Prof. Shields, noting his project was originally intended to be a "political communication study" rather than a "legal study"). However, it appears Shields himself now views the study in a different light. He describes it as establishing the existence of selective prosecution and proposes remedies to address selective prosecution. See *id.* at 234 (stating that the statistics establish "that federal investigations and/or indictments of local officials are highly disproportionate by political party" and that "this is clear proof of a political bias, a bias of selective investigation and prosecution"), 234–36 (proposing various procedural remedies).

⁸⁰ See Sanford C. Gordon, *Assessing Partisan Bias in Federal Corruption Prosecutions* 8 (July 21, 2008) (unpublished working paper) (concluding that Shields study is flawed by this assumption, applying a methodology focusing on sentences in corruption cases, and finding evidence of partisan bias under both the Bush II and Clinton Justice Departments, though noting that results may understate extent of bias under Bush while overstating it under Clinton), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1166343.

⁸¹ *Id.* at 33 (applying a methodology focusing on sentencing in corruption cases, and finding evidence of partisan bias under both the Bush II and Clinton Justice Departments).

⁸² See HOUSE STAFF REPORT, *supra* note 72, at 7–30 (describing in detail allegations concerning Don Siegelman, Georgia Thompson, Dr. Cyril Wecht, Justice Oliver Diaz, and Paul Minor), 30–33 (referring briefly to allegations concerning Senator Robert Menendez, Carl Marlinga, State Senator Vince Fumo, and State Senator Charles Walker); *House Hearing on Allegations of Selective Prosecution*, *supra* note 71, at 2–3 (materials concerning Minor and Diaz), 4–193 (materials concerning Siegelman), 209–24 (materials concerning Wecht), 195–205 (materials concerning Anibal Acevedo-Vilá, Senator Walker, Peter Palivos, and Geoffrey Fieger).

⁸³ *Siegelman Fraud Case Dismissed*, HUNTSVILLE TIMES, Oct. 9, 2004, at 1A; Philip Rawls,

funds bribery, honest services mail fraud, obstruction of justice, Hobbs Act extortion under color of law, RICO violations, and related conspiracy charges.⁸⁴ Most of the charges were based on contributions made by Richard Scrushy, the former CEO of HealthSouth, to help fund a ballot initiative supported by Siegelman that would establish a state lottery to fund secondary education in Alabama.⁸⁵ Scrushy provided two checks totaling \$500,000 for this purpose to the Alabama Education Lottery Foundation. The government charged that Siegelman reappointed Scrushy to the Alabama Certificate of Need Review Board in exchange for the contributions. Siegelman was convicted on seven counts of mail fraud, federal program bribery, and obstruction, and sentenced to more than seven years imprisonment.⁸⁶ The government had advocated a sentence of thirty years⁸⁷ and initially filed but later withdrew a cross appeal to challenge Siegelman's sentence as too lenient.⁸⁸ Immediately following sentencing, Siegelman was taken from the courtroom in handcuffs and leg irons to begin serving his sentence.⁸⁹ Although the Eleventh Circuit ordered Siegelman's release on bail pending the completion of his appeal, it subsequently affirmed his conviction on five of the seven counts.⁹⁰

Hearing on Evidence Was Turning Point, MOBILE REG., Oct. 10, 2004, at B2.

⁸⁴ See Second Superseding Indictment, *United States v. Siegelman*, No. 2:05-CR-119-F (M.D. Ala. Dec. 12, 2005), available at <http://www.al.com/mobile/register/DecemberIndictment.pdf>. Siegelman is charged in counts 1–3, 5–14, 16–17, and 34.

⁸⁵ Compare Brief for the Appellee at 3, 5–18, *United States v. Siegelman*, No. 07-13163-B (11th Cir.) [hereinafter U.S. Brief in *Siegelman*] available at http://lawprofessors.typepad.com/whitecollarcrime_blog/files/govt_brief.pdf (describing evidence concerning Scrushy's delivery of checks to Siegelman), with Brief for Appellant at 6–14, *United States v. Siegelman*, No. 07-13163-B (11th Cir. May 2008) [hereinafter Siegelman brief], available at http://lawprofessors.typepad.com/whitecollarcrime_blog/files/siegelman_final_brief.pdf.

⁸⁶ U.S. Brief in *Siegelman*, *supra* note 85, at 3–4 (detailing counts of conviction and sentence of eighty-eight months imprisonment). Siegelman was acquitted of the remaining twenty-five counts.

⁸⁷ *House Hearing on Allegations of Selective Prosecution*, *supra* note 71, at 9 (Statement of Louis V. Franklin, Sr., Acting U.S. Attorney) (noting guideline calculation leading to guideline level of 42, with a range of 360 months to life).

⁸⁸ Kim Chandler, *Prosecutors Quit Seeking Longer Terms For Siegelman, Scrushy*, BIRMINGHAM NEWS, June 5, 2008, at 6B, available at 2008 WLNR 10716488 (reporting that the Government filed a motion withdrawing its appeal of the sentences as too lenient).

⁸⁹ *Id.*

⁹⁰ *United States v. Siegelman*, No. 0713163, 2009 WL 564659, at *6–11 (11th Cir. Mar. 6, 2009). See Editorial, *Freedom for Siegelman*, BIRMINGHAM NEWS, Mar. 30, 2008, at 2, available at 2008 WLNR 6137779 (reporting that the Eleventh Circuit Court of Appeals had ordered Siegelman's release on bail pending appeal nine months after he began serving his sentence and noting that the standard for release on appeal was that the appeal raised "substantial questions of fact or law likely to result in reversal or an order for a new trial"). See also Editorial, *A Political Prosecution?*, NAT'L L.J., April 14, 2008, at 23 (noting a variety of circumstances about the case that raise "red flags" and concluding that the court of appeals "seems justified" in granting Siegelman's release pending appeal).

The criticism of the Siegelman prosecution generally focuses on two related concerns: a claim that Siegelman was targeted by the Bush White House and U.S. Attorney's Office because he was a successful Democratic politician,⁹¹ and a concern that the theory upon which the case was prosecuted is so broad that it "would mean that a prosecutor has the power to indict and convict any politician and any donor whenever a donation was made and the politician took an action consistent with the donor's desire."⁹²

Much of the criticism of the Siegelman prosecution rests on allegations that the decision to prosecute Siegelman was improperly influenced by senior White House adviser Karl Rove, working in tandem with the U.S. Attorneys in Alabama, especially U.S. Attorney Leura Canary, whose husband worked on the campaign of Siegelman's opponent in the 2002 gubernatorial election. A participant in a call involving U.S. Attorney Canary's husband has stated under oath that Mr. Canary assured the participants in the call that they need not worry about Siegelman contesting the very close gubernatorial election, because the two U.S. Attorneys "could take care of Siegelman," and Karl Rove had arranged matters with the Justice Department, which was "already pursuing Siegelman."⁹³ U.S. Attorney Canary denies these charges, as do other participants in the call.⁹⁴ Karl Rove refused to testify before the House Judiciary Committee on July 10, 2008, about his potential involvement in the Siegelman prosecution or U.S. Attorney firings.⁹⁵ Related to this main claim are charges that Siegelman has been treated more harshly than other similarly situated defendants.⁹⁶

⁹¹ Siegelman was narrowly defeated in the gubernatorial election in 2002 after a controversy about the final vote count. See Steve McConnell, *The Changing of the Guards: Bay Minette, Election Night*, BALDWIN COUNTY NOW, July 20, 2007, http://baldwincountynow.com/articles/2007/07/25/local_news/doc469fbb5bd2a7f444039407.txt.

⁹² Brief in Support of Appellant as Amici Curiae Former Attorneys General at 10, *United States v. Siegelman*, No. 07-13163-B (11th Cir. May 30, 2008) [hereinafter *Attorneys General Amicus Brief in Siegelman*].

⁹³ *House Hearing on Allegations of Selective Prosecution*, *supra* note 71, at 168–93 (Jill Simpson affidavit and supporting documentary evidence), 21–163 (Jill Simpson statement under oath).

⁹⁴ Ms. Canary publicly recused herself from the case, which was prosecuted by a career attorney in her office. See *House Hearing on Allegations of Selective Prosecution*, *supra* note 71, at 5–9. The other participants, Rob Riley, Bill Canary, and Terry Butts all deny Simpson's allegations. *Id.* at 11–13 (affidavit of Robert Riley), 14–16 (affidavit of Matthew Lembke), 17–19 (affidavit of Terry Butts).

⁹⁵ See Memorandum from John Conyers, Jr., Chairman, to Members of the Committee on the Judiciary (July 29, 2008) (recounting background of investigation, efforts to secure Rove's voluntary testimony, subpoena to Rove, and Rove's refusal to appear), available at <http://judiciary.house.gov/hearings/pdf/RoveMemo080730.pdf>. See also *RULING OF CHAIRWOMAN LINDA SÁNCHEZ ON EXECUTIVE PRIVILEGE-RELATED IMMUNITY CLAIMS BY KARL ROVE* (2008), available at <http://judiciary.house.gov/news/PDFs/Sanchez080710.pdf>. An agreement has reportedly been reached for Rove to give deposition testimony under oath. See *supra* note 29.

⁹⁶ For example, another former Alabama governor was convicted of corruption charges in a case where he had personally benefitted, but he received a sentence of probation. *House Hearing on*

The Siegelman prosecution has been the subject of widespread criticism. A bipartisan group of forty-four former state attorneys general wrote to the House and Senate Judiciary committees requesting a full investigation of the case,⁹⁷ stating that “there is reason to believe that the case brought against Governor Siegelman may have had sufficient irregularities as to call into question the basic fairness that is the linchpin of our system of justice.”⁹⁸ The case has been the subject of exposés in media outlets ranging from CBS’s 60 Minutes⁹⁹ to national newspapers,¹⁰⁰ and other popular periodicals including Time magazine¹⁰¹ and Harper’s.¹⁰² The prosecution is also under investigation not only by Congress but also by the Justice Department’s Office of Professional Responsibility.¹⁰³

Although the main focus of concern has been on allegations that the Siegelman prosecution was politically motivated and orchestrated by Karl Rove and others, a second closely related concern has been raised most pointedly by a bipartisan group of more than 50 former state attorneys general. In their amicus

Allegations of Selective Prosecution, *supra* note 71, at 292.

⁹⁷ *Id.* at 290–93 (reprinting letter). See also Kim Chandler, *House Panel to Probe Role of Politics*, BIRMINGHAM NEWS, July 18, 2007, at A1.

⁹⁸ *House Hearing on Allegations of Selective Prosecution*, *supra* note 71, at 291.

⁹⁹ See 60 Minutes: *Did Ex-Alabama Governor Get A Raw Deal?* (CBS television broadcast Feb. 21, 2008), available at <http://www.cbsnews.com/stories/2008/02/21/60minutes/main3859830.shtml>.

¹⁰⁰ See, e.g., Tom Hamburger, *Panels Urged to Probe Ex-Gov.’s Prosecution: Forty-four Former State Attorneys General Ask Congress to Examine the Federal Case Against an Alabama Democrat*, L.A. TIMES, July 17, 2007, at A8; Adam Nossiter, *Democrats See Politics in a Governor’s Jailing*, N.Y. TIMES, Sept. 11, 2007, at A1; Adam Nossiter, *Freed Ex-Governor of Alabama Talks of Abuse of Power*, N.Y. TIMES, Mar. 29, 2008, at A13; Adam Nossiter, *Where Politics Meet a Federal Prosecution Investigating Case Against Ex-Governor*, INT’L HERALD TRIB., Sept. 12, 2007, at 4, available at 2007 WLNR 17821613; *Politics Behind Ex-Governor’s Prosecution?*, SEATTLE TIMES, July 17, 2007, at A10; *Probe Sought in Federal Prosecution: Politics at the Justice Department Are Alleged In Case of Former Gov. Siegelman*, HOUS. CHRON., July 17, 2007, at A5; *Questions About a Governor’s Fall*, N.Y. TIMES, June 30, 2007, at A16.

¹⁰¹ Adam Zagorin, *A Case of Selective Justice*, TIME, Oct. 4, 2007, <http://www.time.com/time/printout/0,8816,1668453,00.html>; Adam Zagorin, *Rove Named in Alabama Controversy*, TIME, June 1, 2007, <http://www.time.com/time/nation/article/0,8599,1627427,00.html?iid=sphere-inline-sidebar>.

¹⁰² Scott Horton, *Vote Machine: How the Republicans Hacked the Justice Department*, HARPER’S MAG., March 2008, at 37, available at <http://www.harpers.org/archive/2008/03/0081943>.

¹⁰³ See Letter from H. Marshall Jarrett, U.S. Dep’t of Justice, Office of Prof’l Responsibility (OPR), to John Conyers, Jr., Chairman (May 5, 2008) (stating that OPR “currently has pending investigations involving, among others, allegations of selective prosecution relating to the prosecutions of Don Siegelman, Georgia Thompson, Oliver Diaz and Paul Minor”), available at <http://alt.cimedia.com/ajc/pdf/polinsider/050508%20response%20to%20report%20r.pdf>; Carrie Johnson, *House Panel Subpoenas Rove over Role in Justice Dept. Actions*, WASH. POST, May 23, 2008, at A10 (stating House Judiciary Committee chairman John Conyers “disclosed yesterday that the Justice Department’s Office of Professional Responsibility has opened an investigation of possible selective prosecution of Siegelman and at least three others, at the request of the House Judiciary panel”).

brief in support of Siegelman's appeal the former attorneys general express concern that his prosecution was founded on a dangerously overbroad interpretation of the mail/wire fraud and federal program bribery statutes that "would have strong repercussions" going far beyond the particular case.¹⁰⁴ The court of appeals took a different view of the case, concluding that the district court had correctly required a *quid pro quo*—though not an "express" *quid pro quo*—and that the testimony of one of Siegelman's former aides was sufficient to establish such a *quid pro quo* for five of the seven counts on which he was convicted.¹⁰⁵

These claims are, of course, related, since interpreting the mail and wire fraud statutes more broadly, without a requirement of an explicit *quid pro quo*, greatly enhances the range of prosecutorial discretion in individual cases and hence the danger that this discretion might be wielded in a partisan fashion.

b. Georgia Thompson

Georgia Thompson, a state procurement officer in Wisconsin, was convicted of mail fraud and federal program bribery as a result of making slight deviations from the procedures in state administrative code and awarding a contract to the low bidder.¹⁰⁶ Thompson was a civil service employee appointed during the administration of the previous Republican governor.¹⁰⁷ Although the winning bidder had made campaign contributions to the Democratic governor, there was no

¹⁰⁴ Attorneys General Amicus Brief in *Siegelman*, *supra* note 92, at 10. As explained in their brief:

Allowing a conviction under either bribery or "honest services" statutes without an explicit *quid pro quo* requirement . . . puts at risk every politician who accepts a campaign contribution in the knowledge that the donor hopes to influence the politician, and every donor who contributes to a campaign with the hope or expectation of receiving a benefit who goes on to receive that benefit. Such an interpretation of the statutes, criminalizing activities that fall far short of an explicit *quid pro quo* agreement, can only lead to an impermissible chilling effect on the First Amendment right to contribute to political campaigns.

Id.

¹⁰⁵ *United States v. Siegelman*, No. 0713163, 2009 WL 564659, at *6–11 (11th Cir. Mar. 6, 2009).

¹⁰⁶ *United States v. Thompson*, 484 F.3d 877, 878 (7th Cir. 2007). Although the company that ultimately received the contract had the highest combined score for price and service, an out-of-state company scored very high on a "dog and pony show" presentation and had the highest combined score. *Id.* After seeking to get her colleagues to change their ratings, Thompson employed a state procedure allowing a "best-and-final" rebid, which led to scores of 1026.6 and 1027.3. *Id.* at 879. With her supervisor's consent, Thompson declared this a tie and awarded the contract to the in-state bidder. *Id.* Although it is not clear precisely which provision of state law it contended had been violated, the government's theory was that "Thompson deflected the decision from the one that should have been made under the administrative process." *Id.* at 880.

¹⁰⁷ Adam Cohen, *A Woman Wrongly Convicted and a U.S. Attorney Who Kept His Job*, N.Y. TIMES, Apr. 16, 2007, at A18.

evidence that Thompson knew of the contribution and no claim that she received any benefit other than a \$1,000 raise as part of her normal civil service review.¹⁰⁸ At oral argument, Judge Diane Wood told the prosecutor the government's "evidence is beyond thin."¹⁰⁹ In an extremely unusual procedure, the Seventh Circuit reversed Thompson's conviction from the bench, declaring her "innocent" and ordering her immediate release from prison.¹¹⁰ In a later opinion, the appellate court concluded that the record at trial was fully consistent with innocent reasons for Thompson's support of the low bidder, including reducing costs and awarding the contract to an in-state company.¹¹¹ The court emphasized the danger in treating any deviation from state laws or regulations as a federal crime, particularly in the absence of any evidence that the employee in question received any kickback or private gain, other than a raise awarded through the normal civil service process.¹¹² The court concluded with the comment that Congress might wish to reconsider the desirability of the wide-open language of the federal program bribery statute and the "honest services" prong of the mail fraud statute:

Courts can curtail some effects of statutory ambiguity but cannot deal with the source. This prosecution, which led to the conviction and imprisonment of a civil servant for conduct that, as far as this record shows, was designed to pursue the public interest as the employee understood it, may well induce Congress to take another look at the wisdom of enacting ambulatory criminal prohibitions. Haziness designed to avoid loopholes through which bad persons can wriggle can impose high costs on people the statute was not designed to catch.¹¹³

Critics charge that Thompson's prosecution was intended to provide a boost to Republicans in hotly contested state elections. They allege that during the run up to the 2006 gubernatorial campaign, the U.S. Attorney revealed the investigation to the media despite Departmental norms against disclosure prior to the filing of formal charges, and that Thompson's trial and conviction then became a major issue during the campaign.¹¹⁴ The Republican candidate ran a barrage of

¹⁰⁸ *Thompson*, 484 F.3d at 879.

¹⁰⁹ Jason Stein, *Experts Say Ruling Hits Prosecutor's Credibility, Court Makes It Clear That U.S. Attorney Must Bring Much Stronger Cases in Fundraising Probes*, WIS. STATE J., April 8, 2007, <http://www.madison.com/wsj/home/local/index.php?ntid=128460&ntpid=2> (quoting Judge Wood).

¹¹⁰ *Id.* (quoting former U.S. Attorney who could not recall any other case in four decades in which Seventh Circuit had reversed from the bench and ordered the defendant released immediately).

¹¹¹ The appellate court recognized there had been testimony that Thompson referred to "political reasons" for the selection, but the court concluded this might have meant no more than political pressure to keep costs down or award the contract to an in-state company. *Thompson*, 484 F.3d at 879–80.

¹¹² *Id.* at 882–84.

¹¹³ *Id.* at 884.

¹¹⁴ Cohen, *supra* note 107, at A18.

ads linking Thompson to Governor Jim Doyle, the incumbent Democrat. (One ad showed Thompson's photo stamped "guilty," and another displayed her name on a jail cell slamming shut.)¹¹⁵ The state Democratic Party Chair said that the Thompson case became the number one issue in the governor's race. Before and after Thompson's trial, prosecutors offered her generous plea concessions in exchange for information and testimony against Governor Doyle or other Democratic officials.¹¹⁶ Bush administration critics noted that Wisconsin was a swing state, which Bush lost narrowly in 2000 and 2004, and that Karl Rove was said to have identified it as the highest priority among the governor's races in 2006.¹¹⁷

Some observers also suggested that there might be a link between the Thompson prosecution and the firing of other U.S. Attorneys, because Steven Biskupic, the U.S. Attorney who prosecuted Thompson, was on an early list of those proposed for dismissal.¹¹⁸ The IG found that Biskupic's name was on the first list of U.S. Attorneys to be considered for removal in 2005 but was not included in any of the lists in 2006.¹¹⁹ The concern, of course, is that U.S. Attorneys whose jobs are on the line may face implicit or explicit pressure to use their office to please their political superiors. Kyle Sampson, who compiled this list, told the IG that he did not recall why he listed Biskupic, but he believed Biskupic was removed from later lists to avoid the ire of Wisconsin Congressman James Sensenbrenner.¹²⁰ Biskupic told the IG that he was unaware that he was ever considered for removal, and he denied discussing the Thompson case with superiors at the Department.¹²¹ Similarly, Sampson said that other U.S. Attorneys who might otherwise have been dismissed were left in office because the Department wished to avoid a confrontation with their home-state senators.¹²²

¹¹⁵ *Id.*

¹¹⁶ Ryan J. Foley, *Doyle Rips Deal in Travel Case; Leniency Offered for Testimony*, CAP. TIMES (Madison, WI), May 18, 2007, at C2, available at 2007 WLNR 9441643 (noting that Thompson was offered the opportunity before trial to plead to two misdemeanors and avoid jail, that she repeatedly rejected such offers on the ground that she had no information about wrongdoing by her superiors, and that prosecutors repeated their offers after trial, implicitly asking her to contradict the testimony she had given under oath).

¹¹⁷ Cohen, *supra* note 107, at A18.

¹¹⁸ See, e.g., *id.* (noting Biskupic's argument that Thompson sought to please her superiors and enhance her job security might describe his motivation for prosecuting her); Editorial, *Another Layer of Scandal*, N.Y. TIMES, Apr. 9, 2007, at A16 (advocating Congressional investigation to determine what Biskupic and other U.S. Attorneys did to escape being dismissed); Dan Eggen, *Gonzales Remains at Center of U.S. Attorneys Controversy*, WASH. POST, April 18, 2007, available at 2007 WLNR 7340745 (noting connection between controversy over U.S. Attorney firings and Biskupic, Republican complaints to the White House regarding Biskupic's failure to prosecute voter fraud, and Biskupic's role in the prosecution of Georgia Thompson).

¹¹⁹ IG REPORT ON REMOVAL OF U.S. ATTORNEYS, *supra* note 2, at 18–20 & n.19.

¹²⁰ *Id.* at 20 n.19.

¹²¹ *Id.*

¹²² *Id.* at 45 (Paula Silsby (District of Maine) and Thomas Marino (Middle District of

II. THE HISTORY OF THE OFFICE OF U.S. ATTORNEY

The Department's unusual structure—its exceptionally large number of presidential appointees in regional offices—is rooted in its history. The Judiciary Act of 1789 gave the authority to enforce federal law to the new federal judicial districts, which generally coincided with the states. The attorney general was not given supervisory authority over the new federal attorneys in each district, though he played a role in a few prosecutions with national implications. This original structure remains in place, but the attorney general has been given supervisory authority over U.S. Attorneys, and more importantly the district-oriented structure has been gradually supplemented by a second level of authority organized under the attorney general. The Justice Department now includes subdivisions, themselves headed by presidential appointees, which have responsibility for the administration of criminal law. And the Department has promulgated an increasing number of standards and regulations for federal prosecution. The current organization of the Department is thus a hybrid, with the original district-oriented authority coinciding with the central authority wielded by the attorney general and the attorneys housed in Main Justice, who work under the supervision of the Department's political leadership.

By the middle of the Twentieth Century, the attorney general had not only the legal authority to exercise general supervision over the U.S. Attorneys, but also the practical prerequisites of sufficient personnel as well as the means necessary to keep apprised of developments in the field. In the past half century there has been a significant centralization of authority. A variety of initiatives have been adopted to regulate prosecutorial discretion at the national level for the stated purpose of promoting consistency and avoiding abuse. These initiatives have considerably reduced the autonomy of individual U.S. Attorneys. But the movement toward centralization and uniformity has not wholly displaced the U.S. Attorneys, who continue to wield considerable authority. The preservation of the authority of the U.S. Attorneys owes something to the weight of tradition and the determined resistance of current and past U.S. Attorneys. But it also reflects a more general recognition that the dispersal of authority has continuing value in the federal system. Congress has had its thumb on both sides of the scale, sometimes acquiescing in and supporting decentralization and independence in the U.S. Attorneys' Offices, but in other instances pressing for uniformity, particularly with respect to sentencing practices. During some periods, Congress has been extremely skeptical of Main Justice. Practical factors have also played a role. The development of the central authority in Main Justice has been offset, to a degree, by changes in the U.S. Attorneys' Offices, which now have larger staffs including more experienced attorneys.

Pennsylvania) were deleted from the list for removal because they had the strong support of their home-state senators and the administration did not want to risk a fight regarding their removal).

The modern era has also been characterized by fundamental changes in the nature of the federal criminal justice system that magnify the importance of prosecutorial discretion. The system has expanded to a degree that would be unimaginable to the founders. There are now more than 4,000 federal offenses, and federal law now occupies much of the same ground as state law. Because the scope of federal law is so broad, federal prosecutors can charge only a tiny fraction of the offenses, and they necessarily exercise discretion in selecting those cases. Moreover, some of the key federal offenses are themselves broad and amorphous, giving federal prosecutors another form of discretion that is especially significant in cases involving allegations of political corruption at the state and local level. These cases now fall within the expanded federal system. Finally, because fewer than five percent of the cases go to trial, in most cases that end with a guilty plea there is no external check on the prosecutor's discretion. Federal prosecution has been transformed into an administrative system.

Despite the many changes that have occurred in the role of the U.S. Attorneys and the makeup of the federal criminal justice system, there has been little change in the patterns of the appointment and removal of U.S. Attorneys. This stability reflects the fact that the traditional system creates valuable patronage opportunities and increases the influence of both the president and the Senate, and it has generally been deemed to be working successfully.

A. Autonomy During the Founding Period

The Judiciary Act of 1789 established the federal district courts and the positions of the judge, marshal, and attorney for the United States in each of the new districts, as well as the position of attorney general.¹²³ Like the attorney general, the new federal attorneys and marshals in each district were appointed by the president with the advice and consent of the Senate.¹²⁴ This structure reflected a respect for the states as distinct communities. The districts coincided with state boundaries except for separate districts in the portions of Massachusetts and

¹²³ Judiciary Act of 1789, ch. 20, § 2 (creating federal judicial districts), § 3 (creating district court in each district to consist of judge who shall reside in the district), § 27 (providing for appointment of marshal in each district who shall serve for term of four years but be removable from office at pleasure of president), § 35 (providing for appointment in each district of an attorney for the United States as well as "attorney-general for the United States"), 1 Stat. 73, 87, 92 (1789). For many years the attorneys representing the United States in each district were generally referred to as "district attorneys," though that phrase does not appear in the Act. For purposes of this article, I will generally use the contemporary phrase U.S. Attorney(s).

¹²⁴ Although the Judiciary Act of 1789 did not expressly identify the appointing authority, it was and has been treated as referring the president's power to appoint inferior officers under Article II. See Griffin B. Bell & Daniel J. Meador, *Appointing United States Attorneys*, 9 J.L. & POL'Y 247, 248-49 (1993) ("In the absence of any congressional enactment on the subject, the existing appointment process functions directly under Article II, Section 2 of the Constitution, which provides that the President shall nominate and, with the 'advice and consent' of the Senate, appoint inferior officers.").

Virginia that would later become the new states of Maine and Kentucky.¹²⁵ This structure was consistent with the founders' concern for ensuring that a person charged with a crime should be tried in the district where the crime was committed by a jury drawn by the residents of that district.¹²⁶

The first Congress declined to give the attorney general the authority to supervise the U.S. Attorneys,¹²⁷ and it made them financially independent of the central government. Their compensation was to be based upon "such fees as shall be taxed therefore in the respective courts before which the suits or prosecutions shall be."¹²⁸ However, during the first eighty years, some institutional authority over the U.S. Attorneys rested with various federal agencies, including the Departments of State¹²⁹ and Treasury,¹³⁰ which had an interest, for example, in the collection of revenues.

During this period, the attorney general did not closely supervise the actions of the federal attorneys in each district, although he supervised and even appeared in a few criminal cases of great national significance.¹³¹ Indeed, a leading scholar

¹²⁵ Judiciary Act of 1789, ch. 20, § 2 (creating federal judicial districts).

¹²⁶ Charles F.C. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 GEO. L.J. 1171, 1205 (1977) (citing U.S. CONST. art. III, § 2, and amend. VI).

¹²⁷ Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561, 585–89 (1989) (noting that the first Attorney General, Edmund Randolph, sought statutory authority to manage federal prosecutions with the backing of President Washington, but Congress refused even to require district attorneys to notify the Attorney General about litigation).

¹²⁸ Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 92–93 (1789). In contrast, the attorney general's compensation was to "be by law provided," i.e., set by Congress. *Id.*

¹²⁹ See Bloch, *supra* note 127, at 585–86 ("Indeed, many observers believed that Secretary of State Jefferson had more control over the district attorneys than Attorney General Randolph had."); Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons From History*, 38 AM. U. L. REV. 275, 287 (1989) ("During President Washington's administration, the Secretary of State evidently assumed titular responsibility for supervising the district attorneys, although that supervision was lax.").

¹³⁰ Act of May 29, 1830, ch. 153, § 5, 4 Stat. 415 (1830) (authorizing the Solicitor of the Treasury "to instruct the district attorneys . . . in all matters and proceedings, appertaining to suits in which the United States is a party, or interested, and cause them . . . to report to him from time to time, any information he may require in relation to the same."). One knowledgeable observer also states that "in the early days," when there was no centralized control, the federal district attorneys and marshals "were chiefly directed by the district judges, who themselves were subject to few rules of procedure and ran their courts pretty much as they pleased." LUTHER A. HUSTON, *THE DEPARTMENT OF JUSTICE* 65 (1967).

¹³¹ In the early 1790s the attorney general participated actively in a test case charging a U.S. citizen who had aided French privateers with violating the neutrality laws and in the prosecution of cases arising out of the Whiskey Rebellion. HOMER CUMMINGS & CARL MCFARLAND, *FEDERAL JUSTICE* 30–31, 43–45 (1937) (describing Attorney General Randolph's attendance at circuit court to secure initial indictments, the use of the military to put down the rebellion after efforts at conciliation failed, and the trial of the resulting cases by the attorney general and the federal district attorney). In both cases, the attorney general and the federal district attorney tried the cases together. Indeed, in

has concluded that Congress deliberately “withheld the means necessary to enable the Executive to coordinate effective control over criminal law enforcement.”¹³² Until the Civil War, the Attorney General’s office was “basically a one-man operation.”¹³³ In 1817, for example, the new attorney general found that he had no office in Washington, no clerical assistance, and there were virtually no files or other records from his predecessors, many of whom resided outside of Washington and discharged their official duties by mail.¹³⁴ Until 1850, Congress provided the Attorney General with only one clerk.¹³⁵ The first full time attorney general, and the first to reside full time in Washington, took office in 1853.¹³⁶ In any event, even if the Attorney General had been given more resources, it would have been impossible to provide close supervision because there were no quick means of travel to or communication with the U.S. Attorneys, who were dispersed throughout the nation. The circumstances thus required the U.S. Attorneys in each district to act with a great deal of independence.

There were, however, two countervailing factors that constrained the range of discretion the U.S. Attorneys exercised in criminal cases. First, during this period the new federal government was small and the number of federal crimes very restricted, generally focusing on direct interference with federal programs, property, or officials.¹³⁷ Second, the Supreme Court limited federal prosecutors to

rare circumstances early presidents issued orders to their district attorneys. For example, George Washington encouraged prosecutions of tax dissenters during the Whiskey Rebellion in 1792. See Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 553–63 (2005) (citing Proclamation of Sept. 15, 1792, in 32 THE WRITINGS OF GEORGE WASHINGTON 150–51 (John C. Fitzpatrick ed., United States Government Printing Press 1931)), for discussion of the involvement of Presidents George Washington, John Adams, and Thomas Jefferson in prosecutions by federal district attorneys.

¹³² Krent, *supra* note 129, at 289.

¹³³ JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS 10 (1978).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ PREVENTING IMPROPER INFLUENCE ON FEDERAL LAW ENFORCEMENT AGENCIES: A REPORT OF THE AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE TO STUDY FEDERAL LAW ENFORCEMENT AGENCIES 33 (1976) [hereinafter PREVENTING IMPROPER INFLUENCE].

¹³⁷ For brief accounts of the early scope of federal criminal jurisdiction, see LISA L. MILLER, THE PERILS OF FEDERALISM: RACE, POVERTY, AND THE POLITICS OF CRIME CONTROL 30–32 (2008), and Sara Sun Beale, *Federal Criminal Jurisdiction*, in 2 ENCYCLOPEDIA CRIME & JUST. 694, 694–95 (2nd ed. 2002).

The principal antebellum federal crimes were (1) acts threatening the existence of the central government, such as treason; (2) misconduct by federal officers, such as acceptance of a bribe; (3) interference with the operation of the federal courts, such as perjury; and (4) interference with other governmental programs, including obstruction of the mails, theft of government property, revenue fraud, and bribery or obstruction of government personnel.

Id. at 695.

the small number of crimes enacted by Congress, holding that there are no federal common law offenses.¹³⁸

B. Supervisory Authority and the Creation of the Department

By the time of the Civil War, Congress was receptive to placing greater authority and resources in the attorney general, balancing the authority given to the federal attorneys in each district with central authority. Although both Congress and the Attorney General made structural changes affecting the U.S. Attorneys immediately before and after the Civil War, the effect of these changes was limited for many years by practical constraints.

The Attorney General was first given supervisory authority over the U.S. Attorneys in 1861,¹³⁹ and in 1870 Congress created the Department of Justice and incorporated the U.S. Attorneys into the new department.¹⁴⁰ The 1870 legislation granted the Attorney General “supervision of the conduct and proceedings of the various attorneys for the United States” and required the new U.S. Attorneys to make reports on their activities.¹⁴¹ Many departments had secured their own solicitors, and many special counsel had been appointed to conduct individual cases. The creation of the department was intended to reduce expenditures by bringing these functions together under the supervision of the attorney general.¹⁴² In order to bring to light any irregular practices, fraud, or abuse, the attorney general employed “examiners” to investigate the accounts and the conduct of cases by the federal district attorneys, and some cases of neglect of duty were reported.¹⁴³

The effect of the new statutory authority, however, was limited for many years by both the practical constraints imposed by geography as well as the tradition of U.S. Attorney autonomy.¹⁴⁴ Writing of the period immediately before and after the Civil War, Attorney General Homer Cummings stated that the U.S. Attorneys “remained all but completely independent.”¹⁴⁵ James Eisenstein notes

¹³⁸ See *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 32, 34 (1812).

¹³⁹ Act of August 2, 1861, ch. 37, § 1, 12 Stat. 285 (1861) (granting the Attorney General “general superintendence and direction of the attorneys and marshals of all the districts in the United States and the Territories as to the manner of discharging their respective duties”).

¹⁴⁰ Department of Justice Act of 1870, ch. 150, 16 Stat. 162 (1870).

¹⁴¹ *Id.* § 16.

¹⁴² LUTHER A. HUSTON ET AL., *ROLES OF THE ATTORNEY GENERAL* 8 (1968). See also CUMMINGS & MCFARLAND, *supra* note 131, at 218–25.

¹⁴³ CUMMINGS & MCFARLAND, *supra* note 131, at 248. See *id.* at 493–94 (noting severe problems caused by the fee system, which created very undesirable incentives).

¹⁴⁴ Bell & Meador, *supra* note 124, at 248 (noting that “[t]he tradition of U.S. Attorney autonomy had become deeply entrenched before 1870” and attributing part of this entrenched autonomy to American geography and “the remoteness from Washington of the ninety-four U.S. Attorneys”).

¹⁴⁵ CUMMINGS & MCFARLAND, *supra* note 131, at 218.

that during this period “[t]he attorney general had little time for supervision of U.S. Attorneys, and some felt it was improper for him to attempt it.”¹⁴⁶ On the other hand, various attorneys general did instruct the U.S. Attorneys in some high priority cases,¹⁴⁷ including the prosecution of violence in the South during the Reconstruction era.¹⁴⁸

In 1910, the Attorney General created a new internal organizational structure for the Department, assigning Assistant Attorneys General to head departments with responsibility for different fields of public law.¹⁴⁹ These divisions were complemented by other units whose function was defined not by subject matter but by the stage or function of the process.¹⁵⁰ This structure made it possible for the

¹⁴⁶ EISENSTEIN, *supra* note 133, at 235 n.36. Former Attorney General Cummings described the situation as follows:

President Pierce had attempted to route departmental law business through the Attorney General, but even then, when called upon, the Attorney General acted merely as an adviser. Black, who succeeded Cushing, believed it wrong to “interfere” with the management of cases in the trial courts and repeatedly refused requests, though he acknowledged a “sort of supervisory power” over the general subject. Attorney General Bates denied himself all authority or responsibility for such cases.

CUMMINGS & MCFARLAND, *supra* note 131, at 218. Cushing and Black served from 1853–57 and 1857–60, respectively, which was before the enactment of the statutory authority for supervision. HUSTON, *supra* note 130, at 252; CUMMINGS & MCFARLAND, *supra* note 131. Bates, who served from 1861–64, held office after the enactment of the initial supervisory legislation. *Id.*

¹⁴⁷ For example, the attorney general prepared lengthy instructions for the new U.S. Attorney for the Utah territory concerning the prosecution of Mormon polygamy. CUMMINGS & MCFARLAND, *supra* note 131, at 253. The largely unsuccessful investigation and prosecution of fraud concerning the contracts for delivery of mail on “star routes” in sparsely settled areas of the West was orchestrated by the attorney general and postmaster general and then carried out by special counsel selected by them with some participation by the attorney general. *Id.* at 253–60 (noting that the original counsel selected by the attorney general and postmaster general included a former federal district attorney from New York, and that the attorney general followed the first prosecution very closely and presented the closing argument himself).

¹⁴⁸ The attorney general was involved in some of the criminal prosecutions arising out of violence in southern states during the Reconstruction period. Local U.S. Attorneys called upon the attorney general and other officials in Washington to provide military assistance to quell violence or maintain order, and to provide more resources to support prosecutions. *See, e.g., id.* at 235 (request for federal troops and funds to hire special counsel). The attorney general responded to these enquiries, and in some cases also provided specific instructions to the U.S. Attorneys regarding the actions to be taken in particular prosecutions. *See, e.g., id.* at 237 (attorney general instructs federal district attorney in North Carolina to resist efforts to have judgments suspended in prosecution of Ku Klux Klan members), *id.* at 238 (attorney general directs dismissal of all charges in N.C. except “high crime” over protest of district attorney), *id.* at 240 (warning U.S. Attorney in South Carolina, who had 1,000 cases pending, that this could not continue because of the expense), *id.* at 241–45 (after Colfax Massacre in Louisiana, the Department sent an investigator to develop facts that led to indictment of ninety-six persons, and later after Justice Bradley, while riding circuit, granted motion in arrest of judgment based on narrow reading of the act, attorney general agreed prosecutions should be suspended until Supreme Court ruled on theory underlying most of the civil rights prosecutions).

¹⁴⁹ *Id.* at 496–97.

¹⁵⁰ *Id.* For example, the Solicitor General was given responsibility for all government interests in the Supreme Court as well as control over all the decision whether to appeal in the lower courts.

Department to deal more efficiently with the growth in the number and complexity of legal issues arising under federal law.

The Criminal Division was established in 1928 to supervise the administration of federal criminal law.¹⁵¹ In 1933, Attorney General Cummings assigned thirty-one functions to the Criminal Division, including responsibility for the federal prohibition laws.¹⁵² The new structure did not, however, displace the U.S. Attorneys who continued to be responsible for litigation in their districts.¹⁵³ Upon occasion, however, the Division was given a more active role. For example, the Attorney General created a special unit during World War II to deal with war-related frauds against the government, which functioned through a central office and field office within the Criminal Division.¹⁵⁴

C. The Modern Era

The advent of modern communication and transportation eventually removed many of the practical barriers to controlling the widely dispersed and locally-oriented U.S. Attorneys, thus paving the way for a reconsideration of the issue of the optimal distribution of federal law enforcement authority. This period has been characterized by a movement toward centralized authority and greater uniformity that has coincided uneasily with a continued recognition of the traditional authority of the U.S. Attorneys.

This shift in the balance between centralized and locally based authority has been taking place during a time of fundamental changes in the nature of the federal criminal justice system that magnify the importance of prosecutorial discretion. As discussed in greater degree below, the extraordinary expansion in the scope of federal criminal law now requires federal prosecutors to exercise discretion in determining which of many possible cases to bring, and it gives them an unprecedented ability to reach allegations of political corruption at the state and local level. New sentencing laws have also given federal prosecutors increased leverage in plea negotiations, and judicial oversight has been radically reduced because the vast majority of cases now end in a plea. In effect, federal prosecution has been transformed into an administrative system, and federal prosecutors wield tremendous discretion within that system.

Id. at 497.

¹⁵¹ HUSTON, *supra* note 130, at 188–89.

¹⁵² *Id.* at 190–91.

¹⁵³ The Criminal Division did not displace the U.S. Attorneys but was given the responsibility of “supervision,” which involved some counseling and advising them. *See, e.g.*, 1942 ATTORNEY GENERAL ANNUAL REPORT 90 (recognizing that the U.S. Attorney has the “primary responsibility . . . for the proper administration of the law in his district” but stating that the Criminal Division “supervision” of the U.S. Attorneys frequently requires the division to “advise and counsel with him”). Similar statements are found in the Attorney General’s annual reports for other years. *See, e.g.*, 1930 ATT’Y GEN. ANN. REP. 36.

¹⁵⁴ 1944 ATT’Y GEN. ANN. REP. 9.

1. Power shifts—unevenly—to Washington as the Department enters the modern era

By the middle of the Twentieth Century, a good deal of power had shifted to Main Justice, though there was substantial variation in the autonomy retained by individual districts.¹⁵⁵ In addition to improved technology, the relatively small size of most U.S. Attorneys' Offices facilitated departmental control during this period,¹⁵⁶ as did high turnover rates and the limited experience of AUSAs. Because AUSAs were not well compensated and lacked job security, their tenure and expertise were generally quite limited.¹⁵⁷ The lack of in-house manpower and expertise made U.S. Attorneys' Offices dependent on Main Justice to take over complex, time-consuming cases or send attorneys from Washington.¹⁵⁸

The Department also took formal steps to regulate the U.S. Attorneys and to eliminate some of their authority. In 1953, the Department established the Executive Office of U.S. Attorneys and promulgated the first version of the U.S. Attorneys' Manual, which was a comprehensive set of formal instructions.¹⁵⁹ In 1966, the attorney general created the organized crime strike forces, which eventually expanded to have offices in scores of cities.¹⁶⁰ The strike force attorneys reported directly to the Department, not to the local U.S. Attorney, and they were seen as a serious blow to the autonomy of the U.S. Attorneys and their control of federal law enforcement in their districts.¹⁶¹ The tension between strike forces and U.S. Attorneys' Offices was well known, and the strain was especially pronounced in districts with the greatest tradition of autonomy.¹⁶²

When James Eisenstein completed the field research for his classic study *Counsel for the United States* in the 1970s, he found the relationship between Main Justice and individual U.S. Attorneys' Offices to be in flux.¹⁶³ There were

¹⁵⁵ EISENSTEIN, *supra* note 133, at 10–11.

¹⁵⁶ *Id.* at 5 (noting that in 1968 almost half of USAOs had four or fewer AUSAs, and by 1975 more than half still had only four to ten AUSAs).

¹⁵⁷ Eisenstein, *The U.S. Attorney Firings*, *supra* note 66, at 231.

¹⁵⁸ *Id.*

¹⁵⁹ EISENSTEIN, *supra* note 133, at 10.

¹⁶⁰ For a description of the development of the strike forces and their organization, see Note, *The Strike Force: Organized Law Enforcement v. Organized Crime*, 6 COLUM. J.L. & SOC. PROBS. 496, 509–21 (1970).

¹⁶¹ See EISENSTEIN, *supra* note 133, at 90 (describing the removal of cases from the U.S. Attorneys by mechanisms such as the strike forces as the biggest long term threat to the autonomy of the U.S. Attorneys and noting that the autonomy of the offices that were least successful in resisting the strike forces was "significantly eroded").

¹⁶² See Ruff, *supra* note 126, at 1205–06 (noting the exacerbation of the "strain between the Department and the field" resulting from actions of strike forces "in some federal districts that historically have had the most independent and well-staffed United States Attorneys' Offices").

¹⁶³ EISENSTEIN, *supra* note 66, at 231 ("The confluence of the multiple factors shaping headquarters and field interactions produced four distinct patterns: 'normal,' 'controlled or ideal,'

significant differences in the degree of autonomy accorded to the various U.S. Attorneys' Offices. Some U.S. Attorneys' Offices were operating as "ideal field offices" with little independence, but a few others were "semi-autonomous."¹⁶⁴ Having a larger number of experienced AUSAs enabled some U.S. Attorneys' Offices to end their reliance on Main Justice for manpower and expertise.¹⁶⁵ For example, the Southern District of New York, with almost seventy AUSAs, rarely ceded cases to attorneys from Main Justice.¹⁶⁶

2. Federal law enforcement changes dramatically

By 1970, the federal criminal justice system was undergoing a profound series of changes, which inevitably influenced the role of the U.S. Attorneys and their relationship to Main Justice. Criminal law became a hot button political issue in the late 1960s, serving as a focal point in presidential and congressional election campaigns.¹⁶⁷ Federal criminal law expanded in every sense.¹⁶⁸ New federal criminal statutes proliferated. In 1998, an American Bar Association Task Force on the Federalization of Crime found that more than forty percent of the federal criminal laws enacted since the Civil War had been passed in a period of roughly twenty-five years, between 1970 and 1998.¹⁶⁹ Another study found that there was over a one-third increase in federal offenses carrying criminal penalties between 1980 and 2004.¹⁷⁰ It is now impossible to say exactly how many federal offenses there are, but the best estimate is that there are more than four thousand.¹⁷¹

'conflict,' and 'semi-autonomous.'").

¹⁶⁴ *Id.* at 232.

¹⁶⁵ *Id.* at 236.

¹⁶⁶ *See id.* at 232.

¹⁶⁷ *See generally* Sara Sun Beale, *What's Law Got to Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 32–44 (1997).

¹⁶⁸ For a discussion of some of the implications of this growth, see generally Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747 (2005).

¹⁶⁹ James A. Strazzella, *The Federalization of Criminal Law: Task Force on the Federalization of Criminal Law*, 1998 A.B.A. SEC. CRIM. JUST. 7.

¹⁷⁰ JOHN S. BAKER, JR. & DALE E. BENNETT, *MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION* 8 (Federalist Society ed., 2004), at http://www.fed-soc.org/doclib/20070404_crimreportfinal.pdf.

¹⁷¹ *Id.* at 4–9. There are several difficulties in getting an accurate count. Because multiple crimes are typically stated in the same section of a statute, it can be very difficult to determine how many different offenses are actually created by a single statute. *See id.* at 7–8. Another problem is finding all of the relevant statutes. Although many criminal statutes are gathered in Title 18 of the U.S. Code, the remainder are scattered throughout the other 50 titles, which encompass more than 27,000 pages. Ronald K. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45, 53 (1998). Many of these statutory provisions incorporate by reference administrative regulations (and may punish as crimes, for example, willful violations). According to American Bar

Federal law now overlaps very substantially with state law, reaching at least some instances of many state offenses, including theft, fraud, extortion, bribery, assault, domestic violence, robbery, murder, weapons offenses, and drug offenses.¹⁷² There are also many more defendants in the federal system. The number of criminal cases and defendants in the federal system has increased very rapidly. The federal criminal caseload has roughly doubled in the last twenty-five years.¹⁷³ Given the limited resources in the federal system, even this increased number of federal cases represents only a fraction of the defendants whose conduct could have been prosecuted under federal law. The mismatch between the broad scope of federal criminal law and the relatively narrow scope of federal resources requires federal prosecutors to select a small fraction of cases to prosecute in federal court, leaving the remainder to be prosecuted under state law. As I have argued elsewhere, the federal prosecutor's choice has profound consequences for defendants. Prosecuting a case under federal rather than state law generally subjects a defendant to a much harsher sentence for the same conduct,¹⁷⁴ and the defendant may also be deprived of procedural protections that would be available under state law.¹⁷⁵

Key federal offenses have also been given an expansive interpretation, leaving their outer boundaries not only broad, but ill-defined. This is particularly true of the main offenses used to prosecute political corruption at the state and local level: mail fraud, Hobbs Act extortion under color of official right, and federal program bribery.¹⁷⁶ Georgia Thompson and Don Siegelman were charged with these offenses.¹⁷⁷ The broad interpretation of these statutes, first advanced in

Association, there are almost 10,000 such administrative regulations that may be subject to criminal enforcement. Strazella, *supra* note 169, at 10.

¹⁷² See Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 997–98 (1995).

¹⁷³ The United States commenced 32,682 criminal cases in 1982 and 35,872 in 1983. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS: ONLINE, tbl.5.8.2007, available at <http://www.albany.edu/sourcebook/pdf/t582007.pdf> (last visited Feb. 20, 2008). In 2007, it commenced 68,413. *Id.* It should be noted, however, that fluctuations in the federal caseload are not new. The peak was more than 92,000 cases during Prohibition, as an avalanche of small cases hit the federal courts, and increases in the caseload in the 1990s brought the numbers back to the same rate as the early 1970s. See Beale, *supra* note 172, at 984 n.19 (describing caseload fluctuation); cf. Sara Sun Beale, *The Unintended Consequences of Enhancing Gun Penalties: Shooting Down the Commerce Clause and Arming Federal Prosecutors*, 51 DUKE L.J. 1641, 1646–48 (2002) (suggesting a positive political theory explanation for *United States v. Lopez*, 514 U.S. 549 (1995), as a manifestation of the Supreme Court's concern that the federal courts would be flooded with criminal cases and become low status "police courts").

¹⁷⁴ Beale, *supra* note 168, at 761–65.

¹⁷⁵ *Id.* at 768–69. It is, however, also possible that in some cases state law may provide greater protections than federal law.

¹⁷⁶ For a general discussion of the breadth of these offenses, see NORMAN ABRAMS & SARA SUN BEALE, *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 160–328 (4th ed. 2006).

¹⁷⁷ See *supra* text accompanying notes 84–122.

prosecutions brought by U.S. Attorneys,¹⁷⁸ exponentially increased the power of federal prosecutors, giving them an entirely new form of discretion to formulate standards of good government and to apply them retroactively to state and local officials.¹⁷⁹

The last two ingredients in the contemporary federal system are the nearly complete shift to an administrative system, rather than an adversarial trial-focused system, and the adoption of national sentencing guidelines and laws imposing harsher sentences. Each of these two changes is significant, and they are even more powerful in tandem. More than ninety percent of all federal convictions are now obtained by a guilty plea.¹⁸⁰ In 2004 there were only 3,346 federal criminal trials, though more than 83,000 federal defendants' cases were concluded.¹⁸¹ In contrast to the traditional expectation that the prosecutor will be subject to multiple checks in an adversarial process that ends in a public jury trial supervised by an independent judge, an administrative system of criminal justice has emerged.¹⁸² Federal prosecutors plea bargain with the advantage of both the broad jurisdiction available under federal law and the leverage that flows from the harsh federal

¹⁷⁸ See Ruff, *supra* note 126, at 1205–06 (noting that the U.S. Attorney who advanced the innovative interpretation of the Hobbs Act did so in violation of two different sections of the U.S. Attorneys' Manual).

¹⁷⁹ See, e.g., Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153, 163–70, 187–99 (1994) (describing the development of the intangible rights doctrine in lower court decisions and its adoption by Congress in 18 U.S.C. § 1346 and arguing that it renders the mail fraud act unconstitutionally vague); Gregory Howard Williams, *Good Government By Prosecutorial Decree: The Use and Abuse of Mail Fraud*, 32 ARIZ. L. REV. 137 (1990). Noting the perception that there is a Hobson's choice "between enacting a specific statute that may be circumvented or a vague statute that is subject to selective enforcement," Professor Moohr observes that "[s]ince the late 1970s, law enforcement officials, the judiciary, and, in their turn, legislators, have chosen the latter option." Moohr, *supra*, at 156.

For cases considering vagueness challenges, see *United States v. Handakas*, 286 F.3d 92 (2d Cir. 2002) (holding honest services provision of mail fraud act unconstitutionally vague as applied), *overruled by United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003) (en banc).

¹⁸⁰ U.S. SENTENCING COMM'N, 2007 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, fig. C (2007), available at <http://www.ussc.gov/ANNRPT/2007/FigC.pdf> (showing that in FY 2007, 95.8% of convictions were obtained by guilty plea and 4.2% were obtained by trial).

¹⁸¹ BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, tbl.5.17.2004, available at <http://www.albany.edu/sourcebook/pdf/t5172004.pdf> (including bench and jury trials for defendants convicted and acquitted).

¹⁸² Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2118 (1998).

sentencing laws.¹⁸³ In effect, federal prosecutors may exercise both adjudicative and lawmaking authority.¹⁸⁴

3. More changes in the relationship between Main Justice and the U.S. Attorneys' Offices

Following nationwide trends, the attorney general and the political leadership of the Department focused increasing attention on the regulation of prosecutorial behavior in order to promote uniformity and define departmental policies and priorities.¹⁸⁵ The Attorney General promulgated the Principles of Federal Prosecution in 1980.¹⁸⁶ The Principles of Federal Prosecution speak in general terms, but they are supplemented by the now massive U.S. Attorneys Manual, which includes more than 200 provisions that require prior approval, consultation, or notification.¹⁸⁷ These initiatives have had the effect of reducing the autonomy of individual U.S. Attorneys. For example, concerns regarding the potential for disparity in the administration of the federal death penalty led to the adoption of a procedure in which the Attorney General makes the determination whether to seek the death penalty, and bases this determination on the recommendation of a Capital

¹⁸³ Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1415 (2003) (noting that "the increased severity of federal sentences, coupled with the wide discretion in charges available to the federal prosecutor on a single set of facts" has depressed the federal trial rate to an unprecedented level). Wright and Miller have recommended that plea bargaining be limited to avoid abuse. Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29 (2002) (advocating aggressive screening of cases and limits on pre-charge bargaining). But see Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1405 n.9 (2003) (arguing that the presence of a "meaningful opportunity" for trial serves as a check on prosecutorial overreaching).

¹⁸⁴ See, e.g., William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001) ("As criminal law expands, both lawmaking and adjudication pass into the hands of police and prosecutors; law enforcers, not the law, determine who goes to prison and for how long.").

¹⁸⁵ The scholarship of Kenneth Culp Davis, an administrative law scholar who argued in favor of subjecting prosecutorial discretion to regulation and review, was instrumental in generating interest on the part of both scholars and policy makers in the regulation of prosecutorial discretion. See generally KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969). For an early discussion of the application of Davis's theories to the Department of Justice, see Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1 (1971).

¹⁸⁶ U.S. DEP'T OF JUSTICE, *PRINCIPLES OF FEDERAL PROSECUTION* (1980), reprinted in *substantial part* in 6 FED. SENT'G REP. 317 (1994). The current version of the PRINCIPLES OF FEDERAL PROSECUTION is included in the USAM, *supra* note 26, §§ 9-27.001 to .760, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrn.htm. For a discussion of the promulgation of the PRINCIPLES OF FEDERAL PROSECUTION and other related policy directives, see Daniel J. Freed & Marc Miller, *Guiding the Discretion of U.S. Attorneys: Department of Justice Policies, 1980-1994*, in 6 FED. SENT'G REP. 299 (1994). There were earlier, more specific prosecutorial guidelines. See Abrams, *supra* note 185, at 22-23, 25-26 (discussing guidelines for postal obscenity and criminal libel cases and federal-state prosecutions).

¹⁸⁷ USAM, *supra* note 26, at § 9-2.400 (Prior Approvals Chart).

Review Committee at Main Justice and the recommendation of the Deputy Attorney General, to whom the committee reports.¹⁸⁸ This process has been controversial because the Attorney General may not only decline to seek the death penalty despite the support of the U.S. Attorney, but may also override the U.S. Attorney in cases where they recommend against seeking the death penalty.¹⁸⁹

Approval is required before charges may be brought under a variety of criminal statutes. For example, U.S. Attorneys must seek the approval of Main Justice before filing criminal RICO charges and certain types of money laundering charges.¹⁹⁰ The Department also limits the U.S. Attorneys' ability to advance novel claims under any criminal statute by requiring the approval of the Solicitor General before the filing of any appeal or petition for certiorari.¹⁹¹

Prior approval is also required before taking a wide variety of procedural steps, including moving for or consenting to the closing of a judicial proceeding, requesting the disclosure of grand jury materials to state or local law enforcement officials, or issuing a subpoena to members of the news media, officers of a foreign bank or corporation temporarily in the U.S., or persons or entities in the U.S. for records located abroad.¹⁹² Approval is required before requesting immunity or initiating the prosecution of an immunized person.¹⁹³ In the area of corporate investigations, the Department moved from a 1999 policy that gave a high degree of deference to U.S. Attorneys' Offices in determining what aspects of corporate cooperation to consider in making charging decisions, to one in which consultation with Main Justice was required before prosecutors could seek waivers of a

¹⁸⁸ USAM, *supra* note 26, at § 9-10.050. See generally Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347, 440 (1999).

¹⁸⁹ See, e.g., John Gleeson, *Supervising Federal Capital Punishment: Why the Attorney General Should Defer When U.S. Attorneys Recommend Against the Death Penalty*, 89 VA. L. REV. 1697 (2003); Richman, *supra* note 61, at 1393. See also William Glaberson, *Ashcroft's Push For Execution Voids Plea Deal*, N.Y. TIMES, Feb. 1, 2003, at A1 (noting Ashcroft had ordered the death penalty in twenty-one cases against the recommendation of the U.S. Attorney in question, and that such cases place the U.S. Attorney and AUSAs who must then prosecute the case in a difficult position).

¹⁹⁰ USAM, *supra* note 26, §§ 9-110.010 to .900 (RICO procedures); *id.* § 9-105.300(4) (requiring Criminal Division approval before charging a financial institution with money laundering under 18 U.S.C. §§ 1956 and 1957); *id.* §§ 9-105.300(4), 9-105.600 (requiring approval of Assistant Attorney General of the Criminal Division before indicting attorney for violation of 18 U.S.C. § 1957 where the criminally derived property is or purports to be fees paid to the attorney for representation). Pre-approval is also required in some civil rights and economic espionage prosecutions. Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 802 (1999).

¹⁹¹ USAM, *supra* note 26, § 9-2.170. See also 28 C.F.R. § 0.20(b) (2008) (giving the Solicitor General the authority to determine whether and to what extent appeals will be taken by the government in any case).

¹⁹² USAM, *supra* note 26, §§ 9-5.150, 9-11.260, 9-13.400, 9-13.525.

¹⁹³ *Id.* §§ 9-23.130, 9-23.400.

corporation's attorney client privilege, to the current policy generally forbidding prosecutors from seeking such waivers.¹⁹⁴

The broadest restriction on the discretion of local prosecutors came in the wake of the adoption of the federal Sentencing Guidelines. The adoption of the Sentencing Reform Act and the promulgation of the sentencing guidelines provided both a rationale and a mechanism for much greater control from Washington of core functions in every U.S. Attorney's Office.¹⁹⁵ Reasoning that inconsistent prosecutorial charging practices could undermine the sentencing uniformity Congress sought to achieve by the creation of the Guidelines system, successive attorneys general issued instructions that federal prosecutors should generally prosecute the most serious readily provable offense.¹⁹⁶ During the Bush Administration, the political leadership at Main Justice welcomed legislation that greatly restricted downward departures and imposed reporting requirements.¹⁹⁷ Until the Supreme Court's decision striking down key elements of the Sentencing Reform Act, the U.S. Attorneys (and their AUSAs) were subject in every case to a web of restrictions under the legislation, the Guidelines themselves, and the Departmental regulations.¹⁹⁸ Indeed, the Guidelines provided an extraordinary new opportunity for greater central control of federal prosecution.

The terrorist attacks of September 11, 2001, also had a significant effect on

¹⁹⁴ The evolution of the Department's regulations on this issue, from Deputy Attorney General Larry Thompson's 2003 memo to the revision adopted by Deputy Attorney General Paul McNulty in 2006, is described in Daniel Richman, *Decisions About Coercion: The Corporate Attorney-Client Privilege Waiver Problem*, 57 DEPAUL L. REV. 295, 297-302 (2008). As Richman notes, the McNulty memo distinguished between category I material, for which the approval of both the U.S. Attorney and the head of the Criminal Division was required, and category II material, for which the written permission of the Deputy Attorney General was required. *Id.* at 301. On August 28, 2008, the Department announced the most recent version of its policy, USAM, *supra* note 26, §§ 9-28.000 to .1300, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm. See Press Release, Dep't of Justice, Justice Department Revises Charging Guidelines for Prosecuting Corporate Fraud (Aug. 28, 2008), available at <http://www.usdoj.gov/opa/pr/2008/August/08-odag-757.html> (noting that "credit for cooperation will not depend on the corporation's waiver of attorney client-privilege," that prosecutors are not permitted to request category II materials, and that they may not consider whether the corporation has advanced attorneys fees to its officers and employees). For a discussion of the controversy over the guidelines, and especially the issue of effectively compelling a corporate defendant or suspect to waive its attorney client privilege, see Julie R. O'Sullivan, *The Last Straw: The Department of Justice's Privilege Waiver Policy and the Death of Adversarial Justice in Criminal Investigations of Corporations*, 57 DEPAUL L. REV. 329 (2008); see also Richman, *supra*.

¹⁹⁵ See generally Richman, *supra* note 61, at 1385-95; Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1440-43 (2008).

¹⁹⁶ Compare Stith, *supra* note 195, at 1440-43, 1469-71 (describing memoranda from Attorneys General Thornburg and Ashcroft), with Sara Sun Beale, *The New Reno Bluesheet: A Little More Candor Regarding Prosecutorial Discretion*, in 6 FED. SENT'G REP. 310 (1994) (describing memorandum from Attorney General Reno allowing some discretion in prosecuting most serious readily provable offense).

¹⁹⁷ See Richman, *supra* note 195, at 1388-90; Stith, *supra* note 195, at 1461-63, 1465-67.

¹⁹⁸ See Stith, *supra* note 195, at 1468-71.

the Department's priorities and general approach. Terrorism became the top departmental priority, and it had a strong centralizing effect, as Department officials tried to "run the operation from the top."¹⁹⁹ The Attorney General announced a new strategy of prevention (in contrast to the traditional focus on prosecutions after criminal activity has occurred),²⁰⁰ and the Department took steps "to maintain a coordinated and consistent national program while at the same time empowering U.S. Attorneys' Office across the country to pursue terrorism investigations and prosecutions."²⁰¹ The Department mandated that each U.S. Attorney create an Anti-Terrorism Advisory Council (ATAC) and appoint a senior prosecutor as the ATAC coordinator to undertake a variety of responsibilities.²⁰² In 2006, a National Security Division was established within Main Justice to centralize management and coordinate operations and policy.²⁰³ The attorneys from the new division have been actively involved in the decision of whether and when to prosecute cases handled by the U.S. Attorney's Offices.²⁰⁴

Although the Department has unquestionably expanded its authority and correspondingly reduced that of the U.S. Attorneys, some factors have helped the U.S. Attorneys retain a degree of their traditional independence and autonomy. Although Congress promoted and even required central review of some prosecutorial actions under the Guidelines, Daniel Richman has shown that over the past several decades Congress has also acquiesced in, and even supported, significant decentralization and independence in the U.S. Attorneys' Offices.²⁰⁵ In some cases, legislators have said so explicitly, and in other cases they have done so

¹⁹⁹ Richman, *supra* note 195, at 1383–84.

²⁰⁰ See COUNTERTERRORISM SECTION, U.S. DEP'T JUSTICE, COUNTERTERRORISM WHITE PAPER 5 (June 22, 2006), available at <http://trac.syr.edu/tracreports/terrorism/169/include/terrorism.whitepaper.pdf> (stating that September 11 "transformed the mission" of the Department and describing the "new strategy of prevention" as the department's "number one goal").

²⁰¹ *Id.* at 6.

²⁰² *Id.* at 5–6.

²⁰³ For a description of the National Security Division's origins and its first 18 months of operation, see NATIONAL SECURITY DIV., U.S. DEP'T JUSTICE, PROGRESS REPORT (April 2008), available at <http://www.usdoj.gov/nsd/docs/2008/nsd-progress-rpt-2008.pdf>.

²⁰⁴ NSD attorneys provide guidance on the important question of when to bring criminal charges. The decision to prosecute a suspect exposes the Government's interest in that person and effectively terminates covert intelligence investigation. Such determinations require the careful balancing of important competing interests: the immediate incapacitation of a terrorist suspect and resultant disruption of terrorist activities through prosecution, on the one hand, and the continuation of intelligence collection about the subject's plans, capabilities, and confederates on the other. The National Security Division is well positioned to contribute to that decision-making process, by virtue of its role in overseeing both the prosecution and intelligence components of the Justice Department's national security efforts.

Id. at 12.

²⁰⁵ Richman, *supra* note 190, at 805–10.

implicitly by directing more resources and personnel to the U.S. Attorneys' Offices while limiting those given to Main Justice.²⁰⁶ These actions seem to reflect Congress's recognition of the value of the U.S. Attorneys as "a critical counterweight to Washington politics."²⁰⁷ For example, the independent role of the U.S. Attorneys during the Watergate era compared favorably to Main Justice, which succumbed to political pressures.²⁰⁸ Richman also notes that decentralization serves another function, permitting Congress to distance itself, when necessary, from enforcement decisions made in individual U.S. Attorneys' Offices.²⁰⁹

Other changes have profoundly altered the national staffing patterns of U.S. Attorneys' Offices, promoting the independence and autonomy of those offices. The growth in the federal caseload has required many more prosecutors, and the U.S. Attorneys' Offices have grown substantially. At the end of 2006, there were approximately 8,000 lawyers working for the Department of Justice.²¹⁰ Of those, about two thirds were in U.S. Attorneys' Offices rather than Main Justice.²¹¹ Although U.S. Attorneys' Offices conduct civil as well as criminal litigation, they allocate seventy-nine percent of their salaries to criminal litigation.²¹² The large number of federal prosecutors and federal prosecutions by itself increases the difficulty of central oversight. Equally important, the position of AUSA has been

²⁰⁶ *Id.* at 806–07.

²⁰⁷ *Id.* at 808.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 809.

²¹⁰ The Department of Justice Budget and Performance Summary reports a total of 7,893 attorneys on board at the end of 2006, including 2,232 performing general legal activities, 345 in the Antitrust Division (which is broken out because it is funded differently), and 5,316 in the U.S. Attorneys' Offices. U.S. DEP'T OF JUSTICE, FY2008 BUDGET AND PERFORMANCE SUMMARY 36 (2008) [hereinafter U.S. DEP'T OF JUSTICE, OF JUSTICE, BUDGET SUMMARY], http://www.usdoj.gov/jmd/2008summary/pdf/036_employment_categories.pdf. The Department estimated that it would have 8,662 attorneys in 2007. *Id.*

²¹¹ *Id.* The Statistical Report for the U.S. Attorneys reports a higher percentage of attorneys are found in the Justice Department, but this seems to reflect the inclusion of lawyers whose duties do not involve litigation. For fiscal year 2006, this report states that AUSAs constituted fifty-six percent of all Department attorneys and seventy percent of the Department attorneys with prosecution or litigation responsibilities. U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT: FISCAL YEAR 2006, at 3 (2006) [hereinafter U.S. DEP'T OF JUSTICE, STATISTICAL REPORT], available at http://www.usdoj.gov/usao/reading_room/reports/asr2006/06statrpt.pdf.

²¹² See U.S. DEP'T OF JUSTICE, BUDGET SUMMARY, *supra* note 210, at 82, available at http://www.usdoj.gov/jmd/2008summary/pdf/081_usa.pdf (estimating that 8,079 of personnel in U.S. Attorneys' Offices, or approximately seventy-nine percent, are involved in criminal litigation and 2,142 in civil litigation). Similarly, the Statistical Report for the U.S. Attorneys states that in fiscal year 2006 about seventy-eight percent of attorney personnel were devoted to criminal prosecutions, and ninety-five percent of all attorney work hours in the federal courts involved criminal rather than civil cases. U.S. DEP'T OF JUSTICE, STATISTICAL REPORT, *supra* note 211, at 3.

transformed from one of patronage to quasi-civil service.²¹³ Only a few decades ago, most AUSAs left their posts when the presidential administration changed.²¹⁴ But civil service protection, including the right to appeal removal,²¹⁵ and increased salaries²¹⁶ made the position more attractive and politically insulated. By 2006, AUSAs nationwide had an average of eleven years of experience in the U.S. Attorneys' Office, as well as prior legal experience.²¹⁷ As the number, tenure, and experience level of AUSAs has grown, information networks have developed among them.²¹⁸ The emergence of a cadre of well-connected career AUSAs has become a major factor promoting the autonomy of the U.S. Attorneys' offices.²¹⁹ In effect, more offices have reached the size and complexity of the exceptional offices that had the greatest autonomy when Eisenstein conducted his study in the early 1970s.

The Department itself has also taken at least one major organizational step to return power to the U.S. Attorneys, merging the organized crime strike forces into the U.S. Attorneys' Offices. The strike forces, which operated from 1966 to 1990, used integrated teams of prosecutors and agents to bring down numerous members and associates of Cosa Nostra, but they also provoked strenuous opposition from the U.S. Attorneys.²²⁰ Attorney General Richard Thornburgh, who dissolved the

²¹³ Eisenstein, *U.S. Attorney Firings*, *supra* note 66, at 235–39, n.44.

²¹⁴ See *Selection and Removal of U.S. Attorneys: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary*, 95th Cong. (1978) (statement of Griffin Bell, Att'y Gen. of the United States) (discussing the high rate of turnover of AUSAs in the late 1960s through the 1970s). See also EISENSTEIN, *supra* note 133, at 33 (noting that in many districts the appointment of AUSAs involved the U.S. Attorney in politics, requiring a "complex process of negotiation, bargaining, and clearance of appointees with party leaders").

²¹⁵ See *Hamlett v. Dep't of Justice*, 90 M.S.P.R. 674 (2002) (holding that the removal power specified by 28 U.S.C. § 542 does not bar an appeal under subch. II of ch. 75 of title 5), *noted in* Eisenstein, *U.S. Attorney Firings*, *supra* note 66, at 237 n.44.

²¹⁶ See Todd Lochner, *Strategic Behavior and Prosecutorial Agenda Setting in United States Attorneys' Offices: The Role of U.S. Attorneys and Their Assistants*, 23 JUST. SYS. J. 271, 283 (2002) ("General job satisfaction aside, two themes consistently were repeated in my interviews to explain the growing length of tenure among assistants: first, the creation of a quasi-civil-service status for assistants, and second, a significant increase in salary vis-à-vis the private sector, coupled with a comparatively less demanding work environment.").

²¹⁷ U.S. DEP'T OF JUSTICE, STATISTICAL REPORT, *supra* note 211, at 3.

²¹⁸ Eisenstein, *U.S. Attorney Firings*, *supra* note 66, at 239.

²¹⁹ See *id.* at 239–40 ("The presence of career attorneys who take pride in their skills, regard themselves as at least as knowledgeable and experienced as attorneys at Main Justice, and adhere to their offices' traditions of independence, all promote autonomy from DOJ control.") Note, however, that some experts contend that the increasing longevity and importance of AUSAs has negatively impacted U.S. Attorneys' Offices. See Lochner, *supra* note 216, at 284–87 (describing the problem of "deadwood" AUSAs—careerists lacking motivation to take on complicated, time-intensive matters—as making it more difficult for U.S. Attorneys to set prosecutorial agendas).

²²⁰ See Note, *The Strike Force*, *supra* note 160, at 519, tbl.II (strike force indictments and convictions for about nineteen months, half of which involved members or associates of Cosa

strike forces, had opposed the independence of strike force attorneys when he served as the U.S. Attorney in Philadelphia.²²¹ While the strike forces were still operating, they had earned the ire of not only the local U.S. Attorneys, but also local judges who preferred the practices of their local U.S. Attorneys. Indeed, the Second Circuit once used its “supervisory power” to reverse a conviction because the strike force attorney had deviated from the practice of the local U.S. Attorney.²²² The court justified its ruling as a “one-time sanction to encourage uniformity of practice,” noting that it had surveyed the U.S. Attorneys in the circuit and determined that all of them followed the same practice of giving grand jury witnesses certain warnings.²²³ The case was remarkable both for its highly questionable use of “supervisory power”²²⁴ and the court’s open hostility to the division of authority between the strike forces and the U.S. Attorneys’ Offices.²²⁵

Finally, the growth in the federal caseload has effectively increased the discretion of both U.S. Attorneys and their AUSAs. At each critical stage—charging, plea negotiations, and sentencing—the sheer size of the federal caseload

Nostra). See also ABRAMS & BEALE, *supra* note 176, at 8–9.

²²¹ See James B. Jacobs & Elizabeth A. Mullin, *Congress’ Role in the Defeat of Organized Crime*, 39 CRIM. L. BULL. 269, 291 & n.140 (2003) (noting that critics charged Thornburg’s proposal to eliminate the strike forces was motivated by turf concerns and citing Sen. Edward Kennedy’s congressional testimony that as a former U.S. Attorney, Thornburg had “a longstanding record of siding with the U.S. attorneys against strike forces in this turf battle”).

²²² *United States v. Jacobs*, 547 F.2d 772 (2d Cir. 1976).

²²³ *Id.* at 773–74. The court stated:

Surprised, as we were, to find that what we had thought to be a common practice of prosecutors in the circuit for more than twenty years was not followed, we canvassed each of the United States Attorneys in the circuit for their practice in this regard. We were informed that every United States Attorney, in practice, warns the potential defendant that he is a target of the investigation. The appeal before us involved a prosecution by the Strike Force in the Eastern District of New York as authorized by 28 U.S.C. § 515.

Id. at 774. The court then parsed the department’s regulations, concluding that the strike forces should be subject to the direction of the U.S. Attorneys and also made clear its discomfort with the strike force, stating that the court was “not committed by statute to allowing them to come into the circuit and to evade the rules and supervision of the United States Attorneys.” *Id.* at 774.

²²⁴ The Supreme Court vacated the court of appeals’ original decision in light of its holding that target warnings were not required. Upon remand, the court of appeals made clear that its decision rested on its supervisory power, and the Supreme Court then granted certiorari and twice heard argument in the case before dismissing it as improvidently granted. See *United States v. Jacobs*, 531 F.2d 87 (2d Cir. 1976), *judgment vacated*, 429 U.S. 909 (1976), *on remand*, 547 F.2d 772 (2d Cir. 1976), *cert. granted*, 431 U.S. 937 (1977), and *cert. dismissed*, 436 U.S. 31 (1978). For a discussion of supervisory power including the *Jacobs* case, see Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433 (1984).

²²⁵ The author of the opinion, Judge Murray Gurfein, had served briefly as an AUSA in the Southern District of New York. See Federal Judicial Center, *Judges of the United States Courts*, Gurfein, Murray Irwin, <http://www.fjc.gov/servlet/GetInfo?jid=930>. No other member of the panel had experience as a federal prosecutor.

makes centralized control very difficult. The difficulty of exercising supervision from Main Justice is perhaps greatest in the case of the day to day decisions about which cases to prosecute, since a case that is never filed is ordinarily invisible to both members of the public and officials in Washington.

Thus, at the end of the day, U.S. Attorneys still wield substantial authority, and that is especially true of the largest offices with the strongest traditions of autonomy.

D. *The Appointment and Removal of U.S. Attorneys*

As noted above,²²⁶ the Judiciary Act of 1789 provided for the presidential appointment of the federal attorneys and marshals in each district with the advice and consent of the Senate. There appears to be general agreement that from the outset the position of federal district attorney (later U.S. Attorney) was regarded as a “political plum[]” that went to party stalwarts,²²⁷ as well as agreement that senators played an important role in the selection of candidates. Indeed, precisely these features of the system have generated periodic calls for reform dating from at least as early as the 1920s.²²⁸

Writing in 1937, former Attorney General Homer Cummings stated, “the rule of senatorial courtesy gives individual Senators great powers in the selection of district attorneys and marshals, an effective veto which imports local politics into the administration of federal justice.”²²⁹ A few years earlier, the National Commission on Law Observance and Enforcement headed by former Attorney General Wickersham made the same point, in greater detail, and argued that the political character of the selection process was a serious problem:

At times, however, an obstacle to effective control and efficient prosecution has been found in the power of the Senate with respect to appointments. The claim of the Senate not merely to exercise a

²²⁶ See *supra* Part II.A.

²²⁷ HUSTON, *supra* note 130, at 64. These were, of course, members of the president’s party. Eisenstein notes that “[i]n the overwhelming proportion of appointments, the department only considers lawyers belonging to the president’s political party.” EISENSTEIN, *supra* note 133, at 35.

²²⁸ PREVENTING IMPROPER INFLUENCES, *supra* note 136, at 44 (describing proposals in 1924 following Teapot Dome scandal and in 1953 “after scandals in the Justice Department during the Truman administration” to appoint U.S. Attorneys on the basis of merit, rather than politics, or to place them under civil service and allow them to move freely from one district to another). Note that in 1924 “[a] representative of the Attorney General’s office” recommended that both the U.S. Attorneys and the Attorney General be appointed on the basis of merit rather than politics. *Id.*

²²⁹ CUMMINGS & MCFARLAND, *supra* note 131, at 499. Luther Huston agreed, commenting that “no district attorney or marshal is likely to be appointed or removed without the approval of his Senator or congressman.” James Eisenstein also recognized that senatorial courtesy gives senators a “potent resource” that they can use “to exert significant influence on the final appointment,” but he emphasized that several other factors affect the strategic environment for the appointments process. EISENSTEIN, *supra* note 133, at 35.

collective power of rejecting unfit nominations but to dictate appointments as the patronage of the Senators of the State in which the district lies has often had a bad effect upon the personnel and conduct of the office. Also in States where the Senators are in opposition to the administration it happens too often that local political organizations insist on treating the office as political patronage The great powers of the district attorney under the continual extensions of Federal jurisdiction in the present century are giving increasing political importance to the office. Hence this treatment of it as a reward for political activity is a serious menace to enforcement of law.²³⁰

Another study of the Department of Justice concluded that the external political constraints on the president's appointment power were at their zenith in the case of U.S. Attorneys, because "these are local offices aspired to by men whose support is valued by Senators from their state and Congressmen from their district," and "often these aspirants are political leaders themselves in their area."²³¹

The only area of disagreement seems to be over the precise balance of power between the senators and the president and his attorney general. Some observers of the Department concluded that the appointment process has been turned on its head, with the senators effectively initiating nominations which are then submitted to the President for approval. Daniel Meador and former Attorney General Griffin Bell wrote:

The system has been and continues to be one in which the Senators, in effect, often nominate individuals, the President consents, and then the Senate confirms. If there are no Senators of the President's party from the state involved, then the state's representatives of the President's party or other local party officials usually make the initial choice.²³²

James Eisenstein found that it was common for Senators to propose candidates to the president, though in most cases they submitted a list containing multiple names.²³³ He also emphasized that a number of factors influence the appointments process. For example, when a new administration takes office, the

²³⁰ GEORGE W. WICKERSHAM, NATIONAL COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION 9 (1931).

²³¹ HUSTON, *supra* note 142, at 50. Huston states that it is sometimes more difficult to satisfy local politicians regarding the appointment of U.S. Attorneys and marshals than the appointment of Supreme Court justices). *Id.* Huston served as the Director of Public Information for the Department of Justice under Attorney General Rogers from 1957-61. See Rolland L. Soule, *Political Science Book Reviews*, 59 J. CRIM. L. & CRIMINOLOGY 639 (1968).

²³² Bell & Meador, *supra* note 124, at 249.

²³³ EISENSTEIN, *supra* note 133, at 43.

president must satisfy numerous patronage commitments and political obligations incurred in the process of the nomination and election, and the new administration's policy objectives will also play a role.²³⁴ Districts also varied a great deal in their views of the U.S. Attorney's role, with some districts having a much greater expectation that the appointees will have significant legal stature and experience, and others placing a much greater emphasis on the candidate's political qualifications.²³⁵ Senators also varied substantially in their interest in pushing particular candidates.²³⁶

The active role taken by many senators and the ability of home state senators to veto a nomination means that many U.S. Attorneys owe their appointments primarily to persons other than the attorney general or the president. This may lead to "a divided or ambiguous sense of allegiance" on the part of the U.S. Attorneys.²³⁷ As noted in part I, for example, David Iglesias felt such a sense of allegiance to Senator Domenici.²³⁸

In theory, the president's power to remove U.S. Attorneys has always been available "both as a stick used against disobedient U.S. Attorneys and a carrot to others still in office."²³⁹ But presidents have rarely used removal to restrict the independence of U.S. Attorneys, at least in recent decades.²⁴⁰ Of fifty-four U.S. Attorneys who did not serve a full term between 1981 and 2006, two were removed by the president, three resigned after news reports indicated they had engaged in questionable personal actions, and for another three, no information was available.²⁴¹ In 1974, former Attorney General Richard D. Kleindienst testified to Congress that "[i]n 4 ½ years, I think there were only one or two situations where a U.S. Attorney fell below the high standards that we felt should be maintained and were asked to resign."²⁴² According to Kleindienst, these U.S. Attorneys "resigned without any hesitation or question whatsoever."²⁴³ In other circumstances, a U.S. Attorney's political support may actually prevent removal.²⁴⁴

²³⁴ *Id.* at 37.

²³⁵ *Id.* at 38–39.

²³⁶ *Id.* at 42.

²³⁷ Bell & Meador, *supra* note 124, at 248–49.

²³⁸ See text accompanying notes 33–34.

²³⁹ Bruce A. Green & Fred C. Zacharias, "The U.S. Attorneys Scandal" and the Allocation of Prosecutorial Power, 69 OHIO ST. L.J. 187, 206 (2008).

²⁴⁰ KEVIN M. SCOTT, CONG. RESEARCH SERV., U.S. ATTORNEYS WHO HAVE SERVED LESS THAN FULL FOUR-YEAR TERMS 1981–2006 (2007), discussed by Eisenstein, *U.S. Attorney Firings*, *supra* note 66, at 233–34.

²⁴¹ SCOTT, *supra* note 240, at 6–7. This number does not include U.S. Attorneys "whose tenure was interrupted by a change in presidential administration." *Id.* at Summary.

²⁴² *Removing Politics from the Administration of Justice: Hearing on S. 2803 and S. 2978 Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 93d Cong. 76 (1974) (statement of Richard G. Kleindienst) [hereinafter *Hearing on Removing Politics*].

²⁴³ *Id.*

Still, removal has been identified as a controversial but potentially effective mechanism of presidential control.²⁴⁵

E. Statutory Reforms Affecting the Department

The Watergate scandal provided the impetus for the enactment of legislation that addressed concerns about the possible misuse of prosecutorial authority by creating the offices of special prosecutor and inspector general. The enactment of these reforms likely took some of the steam off other more radical proposals, discussed in Part III,²⁴⁶ to restructure the Department.

The first innovation, the creation of an inspector general within the Department of Justice, set the stage for the investigation and report described in Part I. The legislation creating the post was not enacted until 1988,²⁴⁷ following a decade of opposition from the Department.²⁴⁸ The Department argued that the creation of an inspector general would interfere with the Attorney General's law enforcement responsibilities.²⁴⁹ Congress responded to these concerns by enacting provisions specific to the inspector general of the Department of Justice.²⁵⁰ For

²⁴⁴ See EISENSTEIN, *supra* note 133, at 98 (describing the comments of a former attorney general who fired some U.S. Attorneys but chose not to fire others to avoid conflict with interested senators).

²⁴⁵ H.W. Perry, Jr., *United States Attorneys—Whom Shall They Serve?*, 61 LAW & CONTEMP. PROBS. 129, 147 (1998) ("Firing a U.S. Attorney is a dramatic action that could have all sorts of political ramifications. Nevertheless, Presidents could undoubtedly control U.S. Attorneys better if they were willing to fire a few, particularly if done at the recommendation of the Attorney General.").

²⁴⁶ See *infra* text accompanying notes 251 to 252.

²⁴⁷ Inspector General Act Amendments of 1988, Pub. L. No. 100-504, § 102(c), 102 Stat. 2515, 2515 (1988).

²⁴⁸ See STAFF OF LEGISLATION AND NATIONAL SECURITY SUBCOMM. OF H. COMM. ON GOVERNMENT OPERATIONS, 100TH CONG., THE NEED FOR A STATUTORY INSPECTOR GENERAL IN THE DEPARTMENT OF JUSTICE 1 (Comm. Print 1988), for a description of struggles by the House of Representatives to create an inspector general in the Department of Justice. According to that report, "Justice was not included in the Inspector General Act of 1978 so that its need for a statutory IG could be thoroughly reviewed." *Id.* at 4. The House tried to create an inspector general at the Department of Justice in each of the 96th through 99th Congresses, but the Senate killed the attempts. *Id.* at 1. The department contended that it already had auditing mechanisms in place, *id.* at 1, and raised "concern over the impact of an IG on departmental law enforcement operations and the ability of the Attorney General to exercise broad-based discretion in directing Justice's investigative, prosecutorial, and litigation functions." *Id.* at 4.

²⁴⁹ The Department opposed the legislation on the following grounds:

First, it would impose an Inspector General on the law enforcement authority of the Attorney General; second, it would allow the Inspector General to interfere with or jeopardize ongoing external investigations and prosecutions; and, third, it may require or permit the Inspector General to disclose sensitive or confidential information.

Inspector General Act Amendments of 1987: Hearing on S. 908 Before the S. Comm. on Government Affairs, 100th Cong. 29 (1987) (statement of Stephen J. Markman, Assistant Att'y Gen. of the United States).

²⁵⁰ See VANESSA K. BURROWS & FREDERICK M. KAISER, CONG. RESEARCH SERV., STATUTORY

example, the Attorney General has greater power to end an investigation by the inspector general than the heads of other departments,²⁵¹ and the Office of Professional Responsibility of the Department of Justice has greater authority over the actions of attorneys in the department.²⁵²

A decade earlier, in a direct response to the Watergate scandal, Congress created the office of special prosecutor (subsequently renamed independent counsel) as part of the Ethics in Government Act.²⁵³ This innovative approach was relatively short lived. The special prosecutor/independent counsel was to be independent from the Department of Justice and Attorney General, so that it could pursue investigations and prosecutions against senior officials within the Department or other parts of the Administration free from political interference or conflicts of interest. Although the Supreme Court upheld the legislation,²⁵⁴ it was allowed to lapse in 1999.²⁵⁵ Subsequent "independent counsel" have been appointed by the Attorney General pursuant to Departmental regulations, rather than legislation.²⁵⁶

III. RETHINKING THE STATUS OF THE U.S. ATTORNEY

The preceding review of the problems experienced during the Bush Administration and the historical evolution of the U.S. Attorneys' position spotlights several key issues. First, there is a danger that the U.S. Attorney's prosecutorial decision making can be improperly influenced by partisan politics. Partisan influence or pressure can come from a wide range of sources, including

INSPECTORS GENERAL: LEGISLATIVE DEVELOPMENTS AND LEGAL ISSUES 2 n.3 (2007), for a list of agencies in which the head has increased control over the inspector general.

²⁵¹ 5 U.S.C. § 8E(a)(1) (2006) (allowing the Attorney General to intervene in the inspector general's investigation if it involves certain areas of "sensitive information").

²⁵² See 5 U.S.C. § 8E(b)(3) (2006) (requiring the inspector general of the Department of Justice to "refer to the Counsel, Office of Professional Responsibility of the Department of Justice, allegations of misconduct involving Department attorneys, investigators, or law enforcement personnel, where the allegations relate to the exercise of the authority of an attorney to investigate, litigate, or provide legal advice, except that no such referral shall be made if the attorney is employed in the Office of Professional Responsibility").

²⁵³ The office of independent counsel was created by Independent Counsel Act, 28 U.S.C. § 40 (1978), and reauthorized for five years by the Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293 (codified as amended at 28 U.S.C. §§591-599). Although it lapsed December 15, 1992, by failure of reauthorization, it was reinstituted by the Independent Counsel Reauthorization Act of 1994, Pub. L. No. 103-270, 108 Stat. 732 (codified as amended at 28 U.S.C. §§ 591-599).

²⁵⁴ *Morrison v. Olson*, 487 U.S. 654 (1988).

²⁵⁵ It expired at midnight on June 30, 1999. For a critique of the independent counsel statute and an argument in favor of allowing it to expire, see Julie O'Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 AM. CRIM. L. REV. 463 (1996).

²⁵⁶ See 28 C.F.R. § 600.1 (2009) (establishing grounds for appointment of an independent counsel).

members of Congress, home-state politicians and party activists, and the White House itself. It may also arise from the U.S. Attorney's own political ambitions. But improper partisan efforts to manipulate prosecutorial charging decisions must be distinguished from proper efforts to prosecute politically sensitive cases or to compel adherence to the administration's priorities²⁵⁷ and also from the exercise of the president's prerogative to appoint or remove individuals who have his full confidence. Federal prosecutors must make choices about the allocation of resources, selecting the kinds of cases and the individual defendants who will face federal charges. Indeed, the need to prioritize has become even more critical because of the explosive growth in the number and reach of federal criminal laws and in the number of federal prosecutions. Federal criminal jurisdiction now covers much of the same ground as state criminal law. Federal prosecutors can reach a breathtakingly wide range of conduct, and they have enormous leverage in a largely administrative system with extremely high sentences. The danger of partisan manipulation has increased as well, because of the breadth and vagueness of key federal corruption offenses. The growth of federal criminal law makes it necessary to reassess the competing values of centralization to achieve uniformity and best practices versus decentralization and flexibility to adapt to the enormous variation in conditions from district to district. Those competing values are reflected in the division of authority between the U.S. Attorneys and the senior leadership in Main Justice.

In the aftermath of the Watergate crisis, there were serious proposals for a radical redesign of the Department of Justice to lessen the president's control and make it operate more like an independent agency²⁵⁸ or to carve out the prosecutorial function and place it in a separate nonpolitical agency.²⁵⁹ Whatever

²⁵⁷ As Bruce Green and Fred Zacharias have demonstrated, this is a very difficult line to draw. See generally Green & Zacharias, *supra* note 9.

²⁵⁸ In 1974, the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary held hearings on several plans to reform the Department of Justice. *Hearing on Removing Politics*, *supra* note 242. Senator Sam Ervin testified that he was "convinced of the utter necessity of removing the Department, insofar as it is possible, from the play of partisan politics." *Id.* at 3 (statement of Sen. Sam Ervin, Chairman, S. Subcomm. on Separation of Powers of the S. Comm. on the Judiciary). He proposed a bill removing the Department of Justice from the executive branch. This bill would ensure the separation of constitutional powers by establishing the Department of Justice as an independent establishment of the United States. *Id.* Under his proposal, the Department of Justice would resemble an independent regulatory commission, with the Attorney General appointed by the President to a six year term. *Id.* The bill granted the Attorney General power to appoint and remove U.S. Attorneys.

²⁵⁹ Whitney North Seymour, Jr., former U.S. Attorney for the Southern District of New York, proposed dividing the Department of Justice by function. See *Hearing on Removing*, *supra* note 242, at 215-16 (statement of Whitney North Seymour, Jr.). According to Seymour, the Department was flawed because the Attorney General was expected "to serve two masters at the same time"—the president and the law. *Id.* at 216. As a remedy, Seymour proposed creating the Office of Chief Prosecutor (including the U.S. Attorneys), which would direct "all of the existing civil and criminal litigation and law enforcement functions in the Department of Justice." *Id.* at 217-18. Interestingly, though, the appointment power would remain with the president, in order to give U.S. Attorneys "a

the merits of such proposals, there is no substantial support at the present time for a total redesign of the Department of Justice, particularly one that raises serious constitutional issues by seeking to reduce the president's control over a central executive function.²⁶⁰ Accordingly, I take as a starting point the current structure of the Department: it is an agency of the executive branch headed by the attorney general and other senior officials who are appointed by the president with the advice and consent of the Senate and who serve at the president's pleasure.

Given the Department's character as an executive branch agency, the question is whether to maintain the unique two-tier structure that now divides authority over criminal prosecutions between the presidential appointees serving in Main Justice and the 93 presidential appointees serving as the U.S. Attorneys in each federal judicial district. As noted in the preceding section, for more than a century power has been shifting, albeit in a halting and uneven fashion, from the U.S. Attorneys to the Department. Should the process of centralization under the attorney general and the political leadership in Main Justice be completed? Perhaps it is time to treat the historical status of the U.S. Attorneys as a vestige of the past and to convert the position of U.S. Attorney to a career civil service status.²⁶¹ This would bring the department's structure in line with those of other executive branch agencies and reduce the bottleneck in the appointments process that occurs at the beginning of each new administration.

I conclude that the present two-tier structure of the Justice Department should be maintained. Converting the U.S. Attorneys to nonpolitical career employees might reduce, but cannot eliminate, the possibility that partisan concerns will improperly influence decisions. The benefits of that reduction in political influence must be balanced against the other values served by the present system, which provides an important check or counterweight on the authorities in Main Justice. The political character of the current appointment cuts both ways. It may

stature in keeping with the importance of the office." *Id.* Seymour was particularly concerned with Senate confirmation, which he saw as the principal source of partisanship among U.S. Attorneys. *Id.* He, therefore, suggested organizing Circuit Nominating Commissions by federal judicial district. *Id.* The president would nominate U.S. Attorneys from lists drafted by these commissions, and only then would the Senate have its say in the traditional confirmation role. *Id.*

²⁶⁰ For a discussion of some of the constitutional issues, see ROBERT L. TIENKEN, CONG. RESEARCH SERV., CONSTITUTIONAL ISSUES RAISED BY S. 2803, 93D CONGRESS—TO ESTABLISH AN INDEPENDENT DEPARTMENT OF JUSTICE (1974), and David C. Weiss, Note, *Nothing Improper? Examining Constitutional Limits, Congressional Action, Partisan Motivation, and Pretextual Justifications in the U.S. Attorney Removals*, 107 MICH. L. REV. 317, 353–54 (2008).

²⁶¹ Similar—and perhaps even stronger—arguments could be made regarding the traditional presidential appointment of the U.S. marshal in each district. One federal judge has called publicly on Congress to professionalize the Marshals Service by eliminating patronage appointments. Sean P. Murphy, *Judge Hits Politics in Choice of Marshals*, BOSTON GLOBE, Mar. 1, 2007, at B1 (describing critical comments of Judge William Young and dismissal of prior marshal in the District of Massachusetts after press disclosures of his "lax work habits and use of his government-owned vehicle for personal errands"). Senator Edward Kennedy has supported professionalization of the marshals, and he was responsible for adding a provision to the Patriot Act establishing criteria for marshals, including four years of command-level law enforcement experience. *Id.*

be a source of improper pressure on U.S. Attorneys, but as a counterweight it may, upon occasion, actually prevent the misuse of prosecutorial authority for partisan purposes. Moreover, to serve as that counterweight, maintaining Senate confirmation is highly desirable. Equally important, by placing greater authority in the hands of each U.S. Attorney the current system localizes the administration of federal criminal law, reinforcing federalism and allowing districts some leeway to adapt federal law to local law enforcement conditions and local practices and norms. It provides a useful structure for a continuing dialogue on what should be uniform and what should be tailored to local conditions. The current system, including both presidential nomination and Senate confirmation, also enhances the prestige of the U.S. Attorney, attracting candidates and providing them with the clout to serve effectively as the chief federal law enforcement officer. It also enhances critical relationships with state and local officials and with federal investigative agencies. The link between the U.S. Attorney and the president who appointed her can be a mechanism for enforcing each administration's policies and priorities, and the political skills and contacts of U.S. Attorneys are valuable. The current system also provides a mechanism for political accountability.

Thus the present system is susceptible to political manipulation, but it would be short sighted to dismiss it as a mere historical vestige. Delegating some degree of political authority to the U.S. Attorney in each federal judicial district serves many valuable functions. What is needed, then, are other mechanisms that reduce the danger of improper political manipulation. In the last section of this article, I sketch out briefly three approaches that are consistent with the system of presidential appointments: screening or nominations panels, restrictions on contact between U.S. Attorneys and political officials, and clarifying and perhaps restricting the scope of the offenses used to prosecute state and local corruption.

A. Politics and Prosecutions

At first blush the conversion of the position of U.S. Attorney seems desirable as a way to take the politics out of federal prosecutions, removing a perennial source of concern that became especially pronounced during the Bush Administration.

Because political affiliation and activities are important criteria in the current system, U.S. Attorneys often have their own political aspirations and strong ideological commitments.²⁶² The risk that politics may improperly influence prosecutorial discretion seems to be heightened in a system in which U.S. Attorneys are both politically ambitious and ideological. As H.W. Perry explained:

A person who is seeking high profile cases and is particularly ideological

²⁶² See Perry, *supra* note 245, at 143 (creating four-quadrant matrix employing two axes, from high to low political aspirations and from highly ideological to non-ideological, which creates four types of U.S. Attorneys).

might be more tempted to use the power of the office for partisan reasons. High profile cases do not necessarily equal partisan cases, but where the U.S. Attorney has high political aspirations and is particularly ideological, there seems to be a greater chance for more partisan justice.²⁶³

As one member of the House Judiciary Committee explained, the present selection process produces U.S. Attorneys who “want to be Federal judges, Governors, or Congressmen” and “are going to do that which is politically expedient for them.”²⁶⁴ Ambitious and ideologically committed U.S. Attorneys may want to exercise their authority in a manner that carries favor with the president and his political advisers. And, as noted in Parts I and II, the Senate confirmation process gives the home state senators enormous influence at the time of the U.S. Attorney’s appointment, which may pave the way for later efforts to influence the U.S. Attorney’s prosecutorial decisions. Any or all of these influences might lead the U.S. Attorney to exercise prosecutorial discretion for improper partisan reasons, such as accelerating or delaying charges in order to influence an election,²⁶⁵ or bringing charges against political opponents based on overly broad interpretations of vague statutes such as honest services mail fraud and federal program bribery.²⁶⁶ Similar influences may lead the U.S. Attorney to ignore corruption, especially if the same party controls the White House and the local political machine.²⁶⁷

In contrast, redefining the U.S. Attorney as a senior nonpartisan position and using a civil service merit selection process would generally result in the selection of non-ideological U.S. Attorneys with low political aspirations. This should greatly reduce the danger that U.S. Attorneys will act for political reasons. Moreover, the U.S. Attorneys would not in any sense be beholden to either the president or their home state senators, and hence not subject to pressure from them.

²⁶³ *Id.* at 144.

²⁶⁴ *Selection and Removal of U.S. Attorneys: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary*, 95th Cong. 79 (1978) (statement of Rep. Robert F. Drinan, Member, Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary). See also Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 486 (1996) (commenting that because U.S. Attorneys are “extraordinarily ambitious and frequently enter electoral politics after leaving office . . . they have strong incentives to use their power while in office to cater to—or to circumvent—local political establishments”).

²⁶⁵ See *supra* text accompanying notes 16–24 (describing pressure felt by U.S. Attorney Iglesias to bring voter fraud indictments before election).

²⁶⁶ See *supra* text accompanying notes 104–05, 106–13 (describing extremely broad interpretations of honest services mail fraud federal program bribery in the prosecutions of Georgia Thompson and former governor Don Seigelman). Dan Kahan argues that U.S. Attorneys have an incentive to internalize the political benefits and externalize the practical and human costs of overbroad interpretations of federal criminal statutes. Kahan, *supra* note 264, at 487–88.

²⁶⁷ I thank Al Alschuler for drawing this point to my attention.

For example, if New Mexico U.S. Attorney David Iglesias had been a career civil service employee, he would not have felt that he owed his job to Senator Domenici or President Bush. Redefining the U.S. Attorneys as nonpartisan civil service employees would also clarify their place within the hierarchy of the Department: they would have no claim to independence and would be subject to the supervision and control of the political leadership within the Department. The number of nominations from the Justice Department would fall into line with those from other departments, reducing the strain on the resources of the Judiciary Committee. Redefining the character of the U.S. Attorneys might also increase their quality. A merit selection process should also ensure that every U.S. Attorney would have had substantial litigation experience, which is not always the case under the current system,²⁶⁸ and it might also produce better management of the U.S. Attorneys' Offices.²⁶⁹

This thumbnail sketch of nonpartisan U.S. Attorneys has undoubted appeal, but recall that our starting point is the assumption that the Department will be headed by political appointees, including the Attorney General. Precisely because the Constitution does not permit the prosecutorial function to be divorced entirely from politics in its broadest sense, the question is whether—on balance—it is helpful to have actors with independent political status and responsibility within each judicial district as well as in Washington. There have been occasional suggestions that political interference is more likely or more dangerous at the district level,²⁷⁰ but that does not entirely square with the picture that emerges from parts I and II of this article. Indeed, in most of the cases where there have been accusations of improper political meddling during the Bush administration, officials in the White House were implicated.²⁷¹ Similarly, during the Nixon

²⁶⁸ For example, J. Strom Thurmond, Jr., the son of Senator J. Strom Thurmond, was twenty-nine years old when he was nominated to be U.S. Attorney for South Carolina; he had been a lawyer for about three years and had tried seven state cases. See Clif LeBlanc, *2 Emerge in S.C. Search for New U.S. Attorney*, THE STATE, Dec. 10, 2004, at B1. Margaret Currin had been out of law school for approximately nine years when she was appointed to succeed her husband, Sam Currin, as U.S. Attorney for the Eastern District of North Carolina, but she had little or no trial experience, having served first as legislative director and counsel to Senator John Tower, and then as assistant dean and associate professor at Campbell University School of Law. See AMERICAN ASSOC. OF LAW SCHOOLS, THE AALS DIRECTORY OF LAW TEACHERS 413 (2007–2008) (biographical entry for Margaret Person Currin).

²⁶⁹ H.W. Perry suggests that U.S. Attorneys who fit this profile (Type IV in his scheme) “would run an office that would reward high efficiency” and “would gain satisfaction from processing workloads and would seek to maximize winning all types of cases.” Perry, *supra* note 245, at 144.

²⁷⁰ Former Attorney General Nicholas Katzenbach said that “political influence in the administration of justice is more likely to start at the bottom, locally, personally, than at the top.” *Hearing on Removing Politics*, *supra* note 258, at 155 (statement of Nicholas Katzenbach).

²⁷¹ See *supra* text accompanying notes 18–24, 91–96, 114–17 (describing allegations concerning involvement of presidential counselor Karl Rove in Thompson and Siegelman prosecutions as well as allegations that Senator Domenici and others contacted the White House seeking the ouster of U.S. Attorney Iglesias when he refused to prosecute Democrats for election

administration, the Attorney General and one Assistant Attorney General were convicted of criminal conduct,²⁷² and the Nixon administration has also been accused of bringing a politically motivated prosecution against one high profile political enemy, former Illinois governor Otto Kerner.²⁷³ In contrast, some commentators have concluded that the U.S. Attorneys' Offices should be given high marks for their independent and professional performance during the Nixon administration.²⁷⁴ Because their constituencies and political loyalties are primarily within their own state and judicial district, U.S. Attorneys can function to some degree as a check on, or a counterweight against, the political appointees in the Department and in the White House.

Making U.S. Attorneys career appointees or eliminating the requirement of Senate confirmation would insulate them from partisan pressures from Congress (especially their home-state senators), but it would also affect their ability to withstand partisan political pressures from officials in the White House or Main Justice. For example, what if a White House political strategist (who might be in league with local officials of their party) wished to use criminal charges to neutralize a popular Democratic politician or to create an issue in an upcoming election? A career U.S. Attorney would not share this political goal, but would she be in a position to withstand pressure to, for example, continue or expand an investigation that does not seem to be leading anywhere? A career appointee (or a political appointee not subject to Senate confirmation) will lack certain advantages that flow from the current selection process. Because the appointment is regarded as a political plum, it is ordinarily reserved for a local attorney who knows and is

fraud).

²⁷² See *United States v. Haldeman*, 559 F.2d 31, 51–52 (D.C. Cir. 1976) (upholding conviction of Attorney General John Mitchell). For a list of those who were indicted by the Watergate grand jury, see John W. Dean, III, *Watergate: What Was It?*, 51 HASTINGS L.J. 609, 611 n.6 (2000). See also *id.* at 612 (noting others, including former Attorney General Kleindienst, who pled guilty).

²⁷³ One prominent example is the conviction of Otto Kerner (who served as governor of Illinois and as a judge of the United States Court of Appeals for the Seventh Circuit) for depriving his constituents of his "honest services" and hence violating the mail fraud statute. See *United States v. Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied* 417 U.S. 976 (1974) (upholding Kerner's conviction). One commentator charged that Kerner was prosecuted because he had earned the ire of Richard Nixon for his role in helping to deliver Illinois's electoral votes to John Kennedy, and that he was the "innocent victim of a vindictive president." HANK MESSICK, *THE POLITICS OF PROSECUTION: JIM THOMPSON, MARJE EVERETT, RICHARD NIXON, AND THE TRIAL OF OTTO KERNER* 220 (1978). See also Williams, *supra* note 179, at 148 (noting that Kerner was prosecuted during the Nixon administration, which brought no charges against thirteen key legislators who were known to have been involved in the conduct that gave rise to Kerner's prosecution).

²⁷⁴ See, e.g., O'Sullivan, *supra* note 255, at 476 nn.55 & 57 (noting that the U.S. Attorney's Office had already developed main outlines of Watergate charges when the Independent Counsel was appointed, and also noting the success of U.S. Attorneys in bringing nonpolitical prosecutions of other major figures, including Vice President Spiro Agnew); Herbert J. Miller, Jr. & John P. Elwood, *The Independent Counsel Statute: An Idea Whose Time Has Passed*, 62 LAW & CONTEMP. PROBS. 111, 115 (1999) (same).

known by her district.²⁷⁵ Many such appointees have already served in elective office and have their own political base.²⁷⁶ The confirmation process ensures that they have either the active sponsorship or at least the acquiescence of their home-state senators and other key local political leaders, as well as the local district judges. These local constituencies have historically backed up the U.S. Attorney in disputes with the Department.²⁷⁷ A career U.S. Attorney would ordinarily not have developed an independent political base, and may indeed have been brought in from outside the district. Indeed, determined political leadership can marginalize and even drive out career attorneys who are not seen as compliant or committed to the administration's policies. It is instructive to compare the situation of the U.S. Attorneys, whose noisy removal generated widespread criticism in the press, Congressional hearings, and a massive report by the IG, with the situation of a number of career supervisory attorneys in the Civil Rights Division, whose advice was ignored or overruled by political appointees, and who were demoted and reassigned to work on unrelated cases during the Bush administration.²⁷⁸

²⁷⁵ See *supra* text accompanying notes 221–25.

²⁷⁶ See generally EISENSTEIN, *supra* note 133, at 80–81.

²⁷⁷ See Eisenstein, *supra* note 133, at 81 (district judge orders lawyers from Main Justice out of the courtroom), *id.* at 82 (U.S. Attorney refuses to follow instructions from Main Justice and invites them to call chief judge of the district knowing that judge would back him up), *id.* at 115–16 (assaults on autonomy of U.S. Attorney would be resisted by alumni of office, including district judges, and district court judges would “cut [the] balls off” of a strike force attorney who was not vouched for by the local U.S. Attorney).

²⁷⁸ Some of the issues were aired at a Senate Committee hearing in 2006. See *Oversight of the Civil Rights Division: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006), 2006 WL 3324886 (statement of Joseph Rich, Lawyer’s Committee for Civil Rights Under Law) (describing how longtime career supervisors in the Civil Rights Division who were considered to have views that differed from those of the political appointees in the Bush administration were reassigned or stripped of major responsibilities, resulting in loss of morale and a large number attorney resignations), available at http://judiciary.senate.gov/hearings/testimony.cfm?renderforprint=1&id=2434&wit_id=5849; *Id.* (statement of Sen. Patrick Leahy, Ranking Member, S. Comm. on the Judiciary). See also Dan Eggen, *Justice Staff Saw Texas Districting as Illegal*, WASH. POST, Dec. 2, 2005, at A1, available at http://www.washingtonpost.com/wp-dyn/content/article/2005/12/01/AR2005120101927_pf.html (describing conflict between career and political staff in Civil Rights Division in voting rights case). The IG’s report sharply criticizes Bradley Schlozman, who served in various senior positions, including Acting Assistant Attorney General for the Division, for improperly considering political or ideological affiliations in hiring career attorneys, assigning individual cases, and forcing the transfer of three appellate attorneys, but it does not focus generally on the broader complaint that career supervisors were either demoted or otherwise removed from the decisionmaking process. See OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF’L RESPONSIBILITY, U.S. DEP’T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING AND OTHER IMPROPER PERSONNEL ACTIONS IN THE CIVIL RIGHTS DIVISION 33–35, 42–43, 45 (2008), available at <http://www.usdoj.gov/oig/special/s0901/final.pdf>. The report concluded with a criminal referral to determine whether criminal charges would be warranted in light of Mr. Schlozman’s statements to Congress. *Id.* at 63.

Finally, it is important to recognize that there may be far less difference than I have assumed in the ambitions of presidential appointees and career nonpartisan U.S. Attorneys.²⁷⁹ A U.S. Attorney, however appointed, has the opportunity to be involved in high profile cases and to develop the kinds of contacts and name recognition that could pave the way to elective office or a judicial appointment. Accordingly, a politically ambitious young lawyer might seek a “career” appointment as an AUSA and then U.S. Attorney in the hopes that it would provide a platform for a later elective office or judicial appointment. And an attorney who had no political ambitions when he or she joined the U.S. Attorney’s Office and was promoted to U.S. Attorney might develop such aspirations after serving for some time as U.S. Attorney. The possibility that some “career” U.S. Attorneys would have or develop such ambitions further weakens the case for restructuring the selection process as a means of eliminating partisan politics from prosecutorial decisionmaking.

B. *The Value of Localizing Federal Prosecution*

The issue of presidential appointment is inevitably bound up with the question whether to further unify and centralize federal prosecution. Since its inception, one of the hallmarks of the federal criminal justice system has been that it is administered at the district level by prosecutors and judges drawn from that district.²⁸⁰ This system is consistent with the design of the U.S. Constitution and with the norms that govern the administration of criminal law in the United States. Federal criminal law is the exception, rather than the rule. It is the states, rather than the federal government, that have general police powers. Moreover states have deliberately dispersed and fragmented the power to investigate and prosecute crime so that this authority is administered at the local level. For example, there are presently more than 2,300 prosecutors’ offices in the United States, and most of those prosecutors are elected.²⁸¹ The tradition of popular local control of the administration of criminal justice has deep historical roots.²⁸² This tradition reflects a recognition of the significant differences between individual communities and the belief that local control serves as a safeguard against administrative misuse of authority.²⁸³

²⁷⁹ Both Rachel and Tony Barkow drew this important point to my attention.

²⁸⁰ See generally *supra* notes 221–31 and accompanying text.

²⁸¹ STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, NATIONAL SURVEY OF PROSECUTORS: PROSECUTORS IN STATE COURTS, 2005 1, 2 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pssc05.pdf> (reporting there were 2,344 prosecutors’ offices and these offices were headed by elected chief prosecutors in all states except Alaska, Connecticut, the District of Columbia, and New Jersey).

²⁸² WAYNE R. LAFAVE, ET AL., CRIMINAL PROCEDURE § 1.4(b) (3d ed. 2007).

²⁸³ *Id.*

The structure of the federal criminal justice system has respected the states and the local communities within the states, allowing federal criminal laws to be administered in a fashion that is tailored to those local communities and their needs. Like the states, the federal system has fragmented and dispersed the authority to prosecute crimes. Since the Judiciary Act of 1789, federal criminal law has been administered at the district level, and federal judicial districts have been comprised of individual states or, when the population is sufficient, portions of a single state.²⁸⁴ Like federal district judges, the U.S. Attorneys are nearly always drawn from within the judicial district,²⁸⁵ and the political character of their appointment serves, to some degree, as a proxy for their connection to the values and priorities of that district. Indeed, what appears to be an anomaly viewed from the perspective of the federal bureaucracy mimics the local political control of elected prosecutors at the state and local level.²⁸⁶ Moreover, the U.S. Attorneys practice within that district, in front of the local district judges and local juries, where they are generally opposed by the local defense bar as well as the federal public defender for the district. The system of regulating legal practice at the state level²⁸⁷ reinforces this local orientation. Indeed, the local rules in many districts require membership in that state's bar as a prerequisite for membership in the bar of the district court, though they may exempt some or all attorneys representing the United States.²⁸⁸ These structural features have persisted, despite the centralization

²⁸⁴ See generally *supra* text accompanying notes 123–25.

²⁸⁵ See *supra* text accompanying note 275. There are occasional exceptions, most recently the high profile appointment of Patrick Fitzgerald as U.S. Attorney for the Northern District of Illinois. Fitzgerald's appointment was sponsored by his home-state senator, who favored experienced prosecutors from other federal districts for all three U.S. Attorney's positions in Illinois. See *Fitzgerald's Finest Achievement*, CHI. TRIB., July 14, 2002, at 8 (praising Sen. Peter Fitzgerald for sponsoring Patrick Fitzgerald and two other nominees who had "no ties to the state's giant law firms or political power structure to serve as U.S. attorney, the most important corruption-fighting position in government").

²⁸⁶ I thank Dan Richman for bringing this point to my attention.

²⁸⁷ See generally GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 1.17 (3d ed. Supp. 2007).

²⁸⁸ For examples of local rules that limit membership in the bar of the district court to attorneys admitted to practice in that state but allowing government attorneys to practice before the court without meeting this requirement, see, e.g., M.D. ALA. LOC. R. 83.1(a)(1) & (c); N.D. ALA. LOC. R. 83.1(a); W.D. N.C. LOC. R. 83.1(C); W.D. VA. LOC. R. III, Att'y Admiss. (1) & (6).

There is considerable variation in the local rules. The rules of some districts seem to place the local U.S. Attorney's Office in the role of gatekeeper in determining whether other attorneys for the government should be permitted to appear in the district court without meeting all of the standard rules for an appearance *pro hac vice*. See, e.g., D. MISS. LOC. R. 83.1(A)(3) (allowing attorneys representing the United States, its agencies, or employees to appear in the district court without being admitted "upon proper introduction to the court by the United States Attorney for this district or one of the United States Attorney's assistants"); E.D. VA. LOC. R. 83.1(A) & (D) (providing that members of the Virginia state bar are eligible to practice in the district, allowing "foreign attorneys" to appear *pro hac vice* when accompanied by a member of the bar of the district court, but exempting from this requirement "[f]ederal government attorneys appearing pursuant to the authority of the United States Attorney's Office," and noting specifically that other attorneys for the Department of

of authority described in Part II. Indeed, the need to rely on and partner with state and local investigators to develop many kinds of federal cases cuts strongly against central control.²⁸⁹ In particular, federal prosecutors are heavily dependent upon state and local investigators for many of the gun and drug prosecutions that now make up such a large part of the federal caseload.²⁹⁰ In effect, the U.S. Attorneys are embedded in the “local legal-political economy,”²⁹¹ and their dependence on local information networks promotes decentralization.

The present federal system is a hybrid. The substantive laws, the rules of criminal procedure,²⁹² and the sentencing guidelines²⁹³ are national, but they are applied by U.S. Attorneys (as well as district judges and defense lawyers) who are drawn from a single state or a subdivision within a state. The structure of the system provides a mechanism for some adaptation or amelioration of federal laws that may be ill-suited to the conditions—or the norms—of particular districts. But there are also mechanisms within the Department of Justice and within the judicial system for harmonization, and, when necessary, for the enforcement of uniform standards and procedures. Indeed, the present system allows a healthy dialogue on the question when uniformity is necessary and when variation should be permitted.²⁹⁴ Since 9/11 uniformity and centralized control have been favored for

Justice must secure local counsel).

Other district court rules eschew the local orientation, allowing an attorney admitted to practice in any state or in any federal district to be admitted to practice in that district. *See, e.g.*, S.D. ILL. LOC. R. 83.1(a) (admitted in any state); W.D. N.Y. LOC. R. 83.1(f) (admitted in any United States District Court and the state bar in which that district is located).

There is some doubt about the validity of local rules that would restrict the attorneys who may represent the United States in the district courts. The Department of Justice has taken the position that such provisions are inconsistent with 28 U.S.C. § 515(a) (2007). Telephone Interview with Colm Connolly, U.S. Att’y for the Dist. of Del. (Jan. 8, 2009).

²⁸⁹ Richman, *supra* note 61, at 1396.

²⁹⁰ U.S. SENT’G COMM’N, CHANGING FACE OF FEDERAL CRIMINAL SENTENCING 1, 9 tbl.4 (2008) (noting increase in drug trafficking, immigration, fraud, and firearms cases accounted for 91.8% of the increase in the caseload from 1991 to 2007), *available at* http://www.ussc.gov/general/20081230_Changing_Face_Fed_Sent.pdf.

²⁹¹ Richman, *supra* note 61, at 1405.

²⁹² The Sumners Courts Act, 76 Pub. L. No. 675, ch. 445, 54 Stat. 688 (1940), authorized the development and promulgation of national rules of procedure for criminal cases, and the first Federal Rules of Criminal Procedure were subsequently adopted by order of the Supreme Court on December 26, 1944, and took effect on March 21, 1946. *See generally* George H. Dession, *The New Federal Rules of Criminal Procedure: I*, 55 YALE L.J. 694, 694–96 (1946).

²⁹³ The Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1987 (1984) (codified as amended in scattered sections of 18 and 28 U.S.C.), created the United States Sentencing Commission and authorized it to promulgate national sentencing guidelines. For a general discussion of the origins of the Commission and the guidelines, see *Mistretta v. United States*, 488 U.S. 361 (1989) (holding that the guidelines the Commission promulgated did not violate principle of separation of powers).

²⁹⁴ For an excellent discussion of the related question of the level at which discretion should be exercised in individual cases, see Green & Zacharias, *supra* note 239.

terrorism related prosecutions, and that is not likely to change.²⁹⁵ But other issues are open to debate. For example, some U.S. Attorneys have opposed the centralization of the death penalty approval process, which now permits the Department of Justice to override the U.S. Attorney's recommendation not to seek death.²⁹⁶ It seems likely that subsequent administrations will revisit this issue.

Indeed, sentencing in non-capital cases provides an excellent example of the degree to which local federal districts have retained a distinct character. Although the Sentencing Reform Act²⁹⁷ was adopted twenty-five years ago to eliminate unwarranted sentencing disparity, there are still wide variations from district to district on such measures as the percentage of defendants sentenced within the Guideline range and the percentage who receive sentences below the range over the opposition of the government support.²⁹⁸ These figures reflect more than just variations in the practices or attitudes of the district judges (or the courts of appeal).²⁹⁹ There are also equally wide variations in government practices and the sentencing factors controlled by the government.³⁰⁰ This is particularly apparent in the statistics concerning sentencing reductions under U.S.S.G. § 5K1.1, which may be awarded *only* upon the government's motion to defendants who have provided "substantial assistance" in the prosecution of others.³⁰¹ There are districts that

²⁹⁵ Daniel C. Richman, *Political Control of Federal Prosecutors—Looking Back and Looking Forward*, 58 DUKE L.J. (forthcoming May 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1289434.

²⁹⁶ Glaberson, *supra* note 189, at A1.

²⁹⁷ Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended in scattered sections of 18 and 28 U.S.C.).

²⁹⁸ In 2007, for example, nationwide 60.8% of defendants were sentenced within the applicable Guidelines range. U.S. SENT'G COMM'N, FEDERAL SENTENCING STATISTICS BY STATE, DISTRICT & CIRCUIT, OCTOBER 1, 2006, THROUGH SEPTEMBER 30, 2007, tbl. 9 (2007), available at <http://www.ussc.gov/JUDPACK/JP2007.htm>. But many districts varied substantially from that average. Fewer than fifty percent of the defendants were sentenced within range in thirteen districts, and more than eighty percent of defendants were sentenced within range in ten other districts. *Id.*

²⁹⁹ The departure rates among the courts of appeals vary widely. See NORMAN ABRAMS & SARA SUN BEALE, 2008 SUPPLEMENT TO FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 239–44 (comparing departure rates in selected circuits before and after Supreme Court's 2007 decisions in *Rita*, *Gall*, and *Kimbrough*); Paul J. Hofer et al., *Departure Rates and Reasons after Koon v. U.S.*, 9 FED. SENT'G. REP. 284, 286 (1997) (noting that circuits developed different sentencing personas and considering how different circuits responded to Supreme Court's decision in *Koon*). The Circuits that Hofer et al. found to have the highest departure rates in 1997, the Ninth and the Second, *see id.* at 286–87, continued to have high rates in 2007. See U.S. SENT'G. COMM'N, PRELIMINARY POST-KIMBROUGH/GALL DATA REPORT, tbls. 1-DC, 1-9 (2008), available at http://www.ussc.gov/USSC_Kimbrough_Gall_Report_September_08_Final.pdf.

³⁰⁰ U.S. SENT'G. COMM'N, FEDERAL SENTENCING STATISTICS BY STATE, DISTRICT & CIRCUIT, OCTOBER 1, 2006, THROUGH SEPTEMBER 30, 2007, tbl. 9 (2007), available at <http://www.ussc.gov/JUDPACK/JP2007.htm>.

³⁰¹ U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2008) provides:

§5K1.1. Substantial Assistance to Authorities (Policy Statement)

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed

typically have very low rates of substantial assistance departures and other districts where more than a third of all defendants receive such government sponsored downward departures.³⁰² As these statistics indicate, each district has its own character, which reflects not only the law enforcement situation in the district, but also the attitudes and practices of both the district judges and the U.S. Attorneys Office. A 1998 study by the staff of the Sentencing Commission confirmed this point, finding wide variations among U.S. Attorneys Offices regarding their practices concerning substantial assistance departures.³⁰³ Similar differences in from district to district exist on many other prosecutorial practices that have a significant bearing on sentences.³⁰⁴

an offense, the court may depart from the guidelines.

- (a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:
 - (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
 - (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
 - (3) the nature and extent of the defendant's assistance;
 - (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
 - (5) the timeliness of the defendant's assistance.

³⁰² There were downward departures in 35.7% of the cases in the Southern District of Ohio, and 3.3% in the District of New Mexico. U.S. SENT'G. COMM'N, FEDERAL SENTENCING STATISTICS BY STATE, DISTRICT & CIRCUIT, OCTOBER 1, 2006, THROUGH SEPTEMBER 30, 2007, tbl. 9 (2007), available at <http://www.ussc.gov/JUDPACK/JP2007.htm>. In comparison, the national average was 14.4%. *Id.* In the six districts in which prosecutors were the most generous with substantial assistance motions, more than one third of defendants received downward departures for their cooperation. *Id.* (D. D.C., E.D. Pa., M.D. Pa., E.D. Ky., S.D. Ohio, and M.D. Ala.). In twenty-four other districts fewer than ten percent of defendants received such departures. *Id.* (D. P.R., D. R.I., E.D. Va., W.D. Va., N.D. W. Va., S.D. W. Va., E.D. La., S.D. Miss., S.D. Tex., W.D. Tex., S.D. Ill., W.D. Wis., D. Neb., D. S.D., D. Alaska, D. Ariz., S.D. Cal., E.D. Wash., D. N.M., W.D. Okla., D. Utah, D. Wyo., S.D. Ga., D. Del.).

³⁰³ LINDA DRAZGA MAXFIELD & JOHN H. KRAMER, U.S. SENT'G COMM'N, SUBSTANTIAL ASSISTANCE: AN EMPIRICAL YARDSTICK GAUGING EQUITY IN CURRENT FEDERAL POLICY AND PRACTICE 8-9, 10 (1998), available at <http://www.ussc.gov/publicat/5kreport.pdf> (finding disagreement among districts regarding appropriateness availability of substantial assistance departure when a defendant provides information concerning his or her own behavior and a lack of uniformly applied criteria for determining when assistance was substantial). For an argument that the Department of Justice's failure to manage the unilateral authority to move for substantial assistance created a judicial backlash, see Frank O. Bowman, III, *Departing is Such Sweet Sorrow: A Year of Judicial Revolt on "Substantial Assistance" Departures Follows a Decade of Prosecutorial Indiscipline*, 29 STETSON L. REV. 7 (1999).

³⁰⁴ See, e.g., Statement of District Judge Robert L. Hinkle Before the U.S. Sentencing Comm'n, Atlanta, Ga. 2-3, 6 (Feb. 11, 2009) http://www.ussc.gov/agendas/20090210/Hinkle_statement.pdf (noting variation from district to district in whether prosecutors apply relevant conduct broadly or narrowly and whether they always file notice of a defendant's prior conviction under 18 U.S.C. § 851).

The existence of such wide variations from district to district is not a recent phenomenon. Since the introduction of the Guidelines, sentences in some districts have been more lenient than the national averages, and leniency has persisted despite various statutory and administrative efforts to increase uniformity.³⁰⁵ This variation might be seen as a problem, or even a failure, of the Guidelines system.³⁰⁶ But in my view these district variations—which have been almost exclusively tipped in favor of leniency—have been desirable. Perhaps that would not have been so if we had achieved perfection in our national laws and policies and needed only to bring the final recalcitrant districts into line. But that is not the case. In the first place, there are inevitable gaps and gaffs in any large system, and that is most assuredly true of the hodgepodge of federal criminal laws and the relatively new system of the federal Sentencing Guidelines. More important, there are systemic problems with our politics and the resulting policies at the national level. What critics have called the pathological politics of crime and hyper-punitiveness have been ascendant at the national level, as Congress has reaped the political benefits of repeatedly expanding federal criminal law and increasing its severity.³⁰⁷ Federal criminal sentences have been repeatedly ratcheted up, and the federal prison population has expanded astronomically.³⁰⁸ In the view of many, the pendulum has swung too far, but it is difficult to find a way to turn the dials back under the glare of the national spotlight. Within some districts, however, the political temperature is lower, and local attitudes do not demand (or perhaps support) sentences at the highest levels. These attitudes may affect offenses across the board, or they may affect only certain classes of offenses or offenders. The same

³⁰⁵ For a discussion of the legislative and administrative efforts to restrict the discretion of individual prosecutors in the context of sentencing, see *supra* text accompanying notes 195–98.

³⁰⁶ Variations among the districts might seem to be inconsistent with one of the chief goals of the Sentencing Reform Act, which was to eliminate the “great variation among sentences imposed by different judges on similarly situated offenders.” *Mistretta v. United States*, 488 U.S. 361, 366 (1989). Moreover, lower sentences might reflect the desire of individual federal prosecutors or U.S. Attorneys’ Offices to reduce their workload by discounting the “price” of a federal conviction, and measures aimed at preventing such discounts could be intended to force prosecutors to work harder to prepare their cases. See Richman, *supra* note 61, at 1400 (citing statement of Professor Frank Bowman).

³⁰⁷ See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001) (describing pathological forces in crime politics); Sara Sun Beale, *What’s Law Got to Do with It?: The Political, Social, Psychological, and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 40–44 (1997) (describing politicization of federal criminal justice policy); Sara Sun Beale, *The News Media’s Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 405–08, 410–12 (2006) (describing increase in punitiveness in the U.S., finding the U.S. more punitive than other Western nations, and relating changes to news media’s increasing focus on crime).

³⁰⁸ See Beale, *supra* note 168, at 761–65 (describing sentence severity in federal system); The Sentencing Project, *The Federal Prison Population: A Statistical Analysis*, http://www.sentencingproject.org/Admin/Documents/publications/inc_federalprisonpop.pdf (last visited Dec. 1, 2008) (noting that the number of federal prisoners increased by eighty-one percent between 1995 and 2003).

attitudes may also be reflected in parallel developments in state law and sentencing practices.

In effect, the present system enhances the authority of locally anchored U.S. Attorneys and reinforces the historic district-oriented structure of both the federal courts and federal prosecutors. This has reinforced federalism, providing a structure in which some local norms and practices can survive, and experimentation can occur. Converting the U.S. Attorneys to career nonpartisan employees would shift power from the districts to Washington, disturbing the balance between the local and national.

C. Effective Administration

Redefining the U.S. Attorney as a nonpartisan civil service officer would also affect the day-to-day administration of federal criminal law in a variety of significant ways. Redefining the character of the position would make it more attractive to some candidates and less attractive to others, change the public and professional perception of the position, alter the frequency with which U.S. Attorneys would be replaced, and spotlight the difficulty of defining effective measures of performance. Finally, making the U.S. Attorney a career employee would reduce democratic accountability and make it more difficult to remove a U.S. Attorney who was ineffective.

It seems clear that changing the character of the position would change the types of individuals who would serve. As noted above, there would be benefits to appointing U.S. Attorneys who did not have their own political ambitions. But it is also true that some of the most distinguished lawyers who have served as U.S. Attorneys would have had no interest in a career position. There is widespread agreement that a presidential appointment carries with it a great deal of prestige, and that the loss of this prestige would be seen as effectively demoting the position. That perception would likely be sharpened if the change were accompanied by further centralization of authority within the Department. In seeking to carry out her duties as the chief law enforcement official within the district, a U.S. Attorney who is a presidential appointee may draw on both the prestige of her position and her preexisting professional and political base within her district. The high profile and politically active candidates currently drawn to the position of U.S. Attorney may have an advantage in seeking to coordinate the various federal agencies with state and local officials, many of whom are elected officials. This is particularly valuable because the rapid expansion of federal criminal law into areas largely left to state enforcement has made cooperation with state investigative agencies and prosecutors absolutely essential.³⁰⁹ A nonpartisan

³⁰⁹ For example, the expanding federal efforts to prosecute violent crime depend upon the local police, because federal agents cannot patrol the streets, do not receive 911 calls, and rarely infiltrate gangs. Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 CRIME & JUST. 377, 406 (2006). The federal emphasis on terrorism prosecutions has increased the reliance on states investigative resources, both to coordinate with federal investigators in terrorism investigations

career employee heading the U.S. Attorneys Office runs the risk of being dismissed as a mere bureaucrat.³¹⁰ The preference for candidates from within the district that is inherent in the current system also favors candidates likely to have good contacts and working relationships with state and local law enforcement personnel. This is especially important because federal prosecutors must depend heavily on local investigators in certain kinds of cases.

Redefining the U.S. Attorney as a nonpartisan civil service officer would likely result in U.S. Attorneys holding their posts for longer periods. This would have both advantages and disadvantages. It is traditional for every U.S. Attorney to be replaced when a new president is elected, and many U.S. Attorneys do not serve a full four year term. The periodic turnover in the U.S. Attorneys' Offices results in a loss of continuity, as well as substantial transition costs. Those costs could be avoided by defining the position. On the other hand, the president's ability to appoint—and remove—U.S. Attorneys helps each administration to enforce its agenda and priorities. Additionally, some scholars have expressed concern that the increasing tenure of AUSAs may diminish their work ethic and productivity over time, leading to an accumulation of dead wood. The same might easily be true for a long serving U.S. Attorney, who might come to view the position as a secure sinecure. The present system provides each new U.S. Attorney with an incentive to make her mark during her relatively brief tenure. Moreover, given the increased tenure of AUSAs,³¹¹ each new U.S. Attorney is assured of having a stable of experienced assistants.

Because most presidential appointees do not come from within the U.S. Attorney's Offices, the traditional system of political appointments can also serve other important values, promoting fairness and avoiding wrongful convictions. Research on the causes of wrongful convictions has produced a large body of scholarship describing the problem of "tunnel vision," the unconscious cognitive biases that plague both police and prosecutors.³¹² Ironically, there is evidence that

and to make up for the diversion of federal investigators from other kinds of cases. *Id.* at 407–16; ABRAMS & BEALE, *supra* note 176, at 126–29 (describing diversion of federal resources and apparent increase in drug prosecutions based upon state and local investigations).

³¹⁰ On the other hand, Ronald Goldstock has suggested that the organized crime strike forces, which were headed by career prosecutors, functioned very effectively during the last few years before they were eliminated, and the career prosecutors who headed these offices were able to forge very effective working relationships with state and local officials. Telephone Interview with Ronald Goldstock, Former Director, New York State Organized Crime Task Force, 1981–94 (Feb. 19, 2009).

³¹¹ See *supra* text accompanying notes 213–19.

³¹² I thank Bruce Green for drawing this point to my attention. For an excellent introduction to the problem of tunnel vision in criminal cases, see Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291. See also Alafair S. Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J. L. & LIBERTY 512 (2007) (discussing strategies that might help prosecutors overcome cognitive biases in discretionary matters); Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587 (2006) (stating that four cognitive biases affect prosecutor's decision-making: confirmation bias, selective information processing, belief perseverance and the

these biases become stronger, rather than weaker, as prosecutors gain experience, and that they affect even prosecutors who are most committed to the ideal of doing justice.³¹³ The structure of the U.S. adversarial system exacerbates these natural biases because prosecutors have constant interaction with the police, victims, and prosecution witnesses, but little contact with the defendant, his family and friends, and defense counsel.³¹⁴ This encourages empathy and loyalty within the prosecution team but isolation from—and often negative attitudes toward—the defense.³¹⁵ As a result, unconscious biases distort the prosecutor's processing of information regarding guilt or innocence. The promotion of AUSAs to be career U.S. Attorneys would do nothing to address these problems, but the periodic presidential appointment of U.S. Attorneys brings in new leadership with diverse experiences, frequently including some experience doing criminal defense work. This aspect of the selection process brings the federal system closer to the English system of having barristers represent both the prosecution and the defense.³¹⁶ Additionally, appointing U.S. Attorneys from private practice may also bring in other skills and talents, including familiarity with the management of a large law firm and the innovative use of technology. Since management is one of the U.S. Attorney's major responsibilities, experience of this nature outside the government could be quite helpful.

Redefining the U.S. Attorney as a nonpartisan civil service officer would reduce democratic accountability by severing the direct link between the U.S. Attorney and the president. This would make it significantly more difficult for a new administration to enforce its policies and priorities, because it is notoriously difficult to alter the practices of a large bureaucracy. Moreover, the power to appoint and remove officials is a critical element in creating and enforcing political accountability,³¹⁷ and that political accountability provides a means of checking the very forms of prosecutorial abuse that are of greatest concern. Justice Scalia made this point in his dissenting opinion in *Morrison v. Olson*:

Under our system of government, the primary check against prosecutorial abuse is a political one. The prosecutors who exercise this awesome discretion are selected and can be removed by a President,

avoidance of cognitive dissonance).

³¹³ Findley & Scott, *supra* note 312, at 327–31.

³¹⁴ Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475, 486–87, 490 (2006).

³¹⁵ *Id.* at 490.

³¹⁶ Cf. George C. Thomas, III, *When Lawyers Fail Innocent Defendants: Exorcising the Ghosts that Haunt the Criminal Justice System*, 2008 UTAH L. REV. 25, 44–47 (suggesting reform of U.S. adversarial system based on practice of British barristers and judge advocates in U.S. military justice system who represent both prosecution and defense).

³¹⁷ For a classic discussion of this point, see Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).

whom the people have trusted enough to elect. Moreover, when crimes are not investigated and prosecuted fairly, nonselectively, with a reasonable sense of proportion, the President pays the cost in political damage to his administration. If federal prosecutors “pick people that [they] thin[k] [they] should get, rather than cases that need to be prosecuted,” if they amass many more resources against a particular prominent individual, or against a particular class of political protesters, or against members of a particular political party, than the gravity of the alleged offenses or the record of successful prosecutions seems to warrant, the unfairness will come home to roost in the Oval Office.³¹⁸

Justice Scalia would likely argue that furor created by the U.S. Attorney firings and the Congressional investigations into claims of prosecutorial abuse prove his point.

Appointing career U.S. Attorneys would also go hand in hand with centralizing more authority in Main Justice. Although the Bush administration’s removal of the U.S. Attorneys was extraordinarily haphazard and unprofessional, the Department has attempted to develop effective systems for reviewing the performance of each U.S. Attorneys Office. Unfortunately, few good performance measures have been devised, and there is a great danger of reliance on crude measures that emphasize quantity rather than quality.³¹⁹ The present system responds to these problems in two ways. First, it creates a direct link between each U.S. Attorney and the administration that has appointed her, increasing the likelihood that she shares the administration’s values and priorities. Second, it limits the damage that a poorly performing U.S. Attorney can do, since she can be removed by the president, and, in any event, will leave office at the end of the administration. Redefining the position as one subject to civil service type protections, in contrast, would make the removal of a U.S. Attorney who did not perform well extremely difficult.

³¹⁸ Morrison v. Olson, 487 U.S. 654, 727–28 (1988) (Scalia, J., dissenting). *But see* Kahan, *supra* note 64, at 487 (arguing that the Department of Justice “lacks the adequate political incentives to check individual U.S. Attorneys, especially once they have initiated sensational prosecutions”).

³¹⁹ See generally Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 615 (2005) (noting the general tension between measures of quality and quantity). For example, a U.S. Attorney may have the choice of bringing several quick and easy gun prosecutions based on the work of local police or one complex fraud case that will require a grand jury investigation and substantial prosecutorial resources. David Richman, Response, *Judging Untried Cases: In response to Trial Distortion and the end of Innocence in Federal Criminal Justice*, 156 U. PA. L. REV. PENNUMBRA 219, 223 (2007); <http://www.pennumbra.com/responses/11-2007/richman.pdf>. There has been substantial criticism of the Department’s terrorism case statistics; critics claim the Department includes a large number of minor cases with little or no connection to terrorism. See Robert M. Chesney, *Federal Prosecution of Terrorism-Related Offenses: Conviction and Sentencing Data In Light of the “Soft-Sentence” and “Data-Reliability” Critiques*, 11 LEWIS & CLARK L. REV. 851, 873–76 (2007).

D. Other Mechanisms to Buffer Political Influences

It would take a very strong case to bring about change in the present system of appointing U.S. Attorneys, because both the president and the Senate benefit. Given the value of lodging authority at the district level and the administrative advantages of the current system, it is difficult to argue that the case has been made for converting the position of U.S. Attorney to a nonpartisan career appointment. Because the danger of improper political influences is nonetheless real, the better course is to find mechanisms to prevent or at least mute the worst of the political pressures that have been brought to bear on U.S. Attorneys from time to time. Although I do not favor restricting the president's removal power, three other options seem promising: screening or nominations panels, restrictions on contact between U.S. Attorneys and political officials, and clarifying and perhaps restricting the scope of the offenses used to prosecute state and local corruption.

1. Limitations on removal

Although this article begins with a focus on the firing of U.S. Attorneys, I do not advocate limiting the president's authority to remove a U.S. Attorney. To some degree, this is simply one consequence of my position that the U.S. Attorneys should remain presidential appointees.³²⁰ In my view, the president should have the authority to appoint individuals who share his administration's priorities and to remove a U.S. Attorney, such as Carol Lamm, who fails to follow those priorities.

In addition, two factors have changed the landscape, reducing the likelihood that the president will remove U.S. Attorneys for improper reasons or that U.S. Attorneys will feel threatened by the possibility of removal. The first change is the repeal of the short lived provision giving the Attorney General the unilateral authority to appoint an interim U.S. Attorney. Because the president's power to appoint a replacement is now subject to the counterweight of Senate confirmation, the temptation to remove a U.S. Attorney for improper reasons has been reduced. The second factor is the firestorm of controversy that the Bush Administration's actions aroused. Future presidents know that they will not have the unfettered choice of a replacement and that the removal of a U.S. Attorney will be closely scrutinized. Indeed, one way of reading the events described here is as a success story: as a result of public outcry the system corrected itself. These factors seem likely to have a major effect on the calculus of all of the actors, at least in the near future.³²¹

³²⁰ But see Weiss, *supra* note 260, at 348–63 (arguing that Congress possesses the constitutional authority to restrain the president's removal of U.S. Attorneys, and proposing legislation that would require a report of the grounds for removal and provide removed U.S. Attorney with a cause of action to challenge her removal).

³²¹ Indeed, some concern has been expressed that the future presidents will be unduly deterred from removing U.S. Attorneys whose performance is substandard. I do not view this as a serious

2. Nominating or screening panels

A more promising option is the use of nominating or screening panels. These panels could serve a number of valuable purposes, depending upon how they were structured. There are many models of selection panels for judges,³²² and bills including merit selection commissions were introduced in Congress in the late 1970s.³²³ Senators in nine states currently use panels to recommend candidates for judicial vacancies, and in three states the same panels recommend U.S. Attorney candidates.³²⁴ A system in which a commission or panel presents a slate of potential nominees for the consideration of the president can buffer the U.S. Attorney to some degree from her political masters (both the president and the home state senators), and it might also open the selection process up to candidates of substantial professional accomplishment who lack strong political ties to the administration. Yet the final choice would remain that of the president (who may consider political factors),³²⁵ and the U.S. Attorney would retain the prestige and

concern because prior administrations very seldom found it necessary to remove U.S. Attorneys before the end of their term. *See supra* text accompanying notes 240–44.

³²² *See generally* THE AM. JUDICATURE SOC'Y, MODEL JUDICIAL SELECTION PROVISIONS (2008), available at http://www.ajs.org/selection/docs/MJSP_web.pdf (providing a detailed merit selection plan for judges and commentary on the practices of existing merit selection commissions). In 2008, the American Bar Association House of Delegates adopted a resolution recommending the establishment of bipartisan panels to nominate candidates for the federal judiciary. *See* Amanda Bronstad, *Cooling off Judicial Selections: Push for Bipartisan Panels Debated*, NAT'L L.J., Sept. 8, 2008, at 1.

³²³ Two bills introduced in 1978, H.R. 10514, 95th Cong. (1978) and H.R. 12654, 95th Cong. (1978), revised the selection process for U.S. Attorneys, creating strong merit selection commissions. These bills were in response to the Carter administration's removal of U.S. Attorney David W. Marston after its initial endorsement of merit selection. *See Selection and Removal of U.S. Attorneys: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary*, 95th Cong. 48 (1978) (statements of Griffin Bell, Att'y Gen. of the United States, and Rep. Tom Railsback); *see also* Editorial, *On the Selection of U.S. Attorneys*, 61 JUDICATURE 396, 396 (1978) (discussing Marston's removal and merit selection of U.S. Attorneys).

³²⁴ AMERICAN JUDICATURE SOCIETY, FEDERAL JUDICIAL SELECTION, http://www.judicialselection.us/federal_judicial_selection/federal_judicial_nominating_commissions.cfm?state=FD (last visited Feb. 16, 2009) (describing nominating commissions in California, Colorado, Florida, Georgia, Hawaii, Pennsylvania, Texas, Washington, and Wisconsin) [hereinafter AJS FEDERAL JUDICIAL SELECTION]. The panels in California, Florida, and Washington recommend candidates for U.S. Attorney. *See id.* (describing California panels); Florida Federal Judicial Nominating Commission, Rules of Procedure, Revised August 2007, available at http://www.judicialselection.us/uploads/documents/FL_FJNC_rules_69517EF8A0D80.pdf (last visited Feb. 16, 2009) [hereinafter Florida Nominating Commission]; Wisconsin Federal Nominating Charter, available at http://www.judicialselection.us/uploads/documents/WI_charter_D88C3BA6A5469.pdf (last visited Feb. 16, 2009) [hereinafter Wisconsin Nominating Charter].

³²⁵ Indeed, the president could even be given the option of making a selection not included on the list. *See, e.g.*, H.R. 11018, 95th Cong. (1978) (creating a merit selection commission to propose nominees for U.S. district judge, U.S. Attorney, and U.S. marshal but suggesting only that the President "be guided by the list").

authority that comes with a presidential appointment. The process also retains senatorial influence at the confirmation stage.³²⁶

Moreover, the makeup of the selection panel can be fine tuned to increase or decrease the influence of the president and home state senators. The authority to name the members of the selection panel could be lodged in either the president or the home state senators. Restrictions may be imposed on the makeup of the panel, such as a requirement that there be a balance in political party affiliation.³²⁷ The panels could also include individuals with key perspectives on the appointment, such as the local chief judge, the outgoing U.S. Attorney, and/or members representing the state bar.³²⁸

The nominating panels presently in use by various senators demonstrate some of the options. Most, but not all, of the commissions were established by and report to both senators.³²⁹ California is unusual. Each senator has appointed her own commission, and they will alternate in screening, interviewing, and recommending candidates for federal judgeships as well as for U.S. Attorney and U.S. marshal.³³⁰ Most of the panels operate statewide, but again California is unusual in having separate panels for each judicial district.³³¹ Florida has a single statewide commission, but it is made up of three conferences that correspond to the federal judicial districts.³³² The panels vary widely in size, having as few as six or as many as fifty-six members.³³³ In most cases, the senators appoint all members of the panels, but there are exceptions, including the inclusion of some members to

³²⁶ *But cf. supra* note 258, at 218 (proposal of former U.S. Attorney Whitney North Seymour to have the president select U.S. Attorneys from a list proposed by a circuit-wide nominating committee but not to make the positions subject to Senate confirmation).

³²⁷ *See, e.g.,* H.R. 10514, 95th Cong. (1978) ("No more than three members of each commission may be members of the same political affiliation"); H.R. 12654, 95th Cong. (1978) (same).

³²⁸ *Cf. Selection and Removal of U.S. Attorneys: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary*, 95th Cong. 98 (1978) (statement of Rep. John B. Anderson) (suggesting that U.S. Attorney nominating panel could include outgoing U.S. Attorney, individuals appointed by the chief judge of the federal judicial circuit, the chief judge of the federal district court, bar associations, and the Governor).

³²⁹ In Colorado, Senator Salazar uses a nominating commission, but Senator Udall does not. AJS FEDERAL JUDICIAL SELECTION, *supra* note 324.

³³⁰ *Id.* (describing California process announced in early 2009).

³³¹ *Id.*

³³² Florida Nominating Commission, *supra* note 324, Rules 6–10. All members of the state wide commission receive and rank all applicants, and after consideration of the rankings, the conference in question invites candidates for interviews, deliberates in closed session, and then certifies no fewer than three applicants per vacancy. *Id.* Rules 17, 21–24. The chair of the statewide commission is a member of each of the conferences. *Id.* Rule 6.

³³³ The smallest panels are found in Georgia and Washington, which have six members, and Colorado, which has eight. The largest are Florida, with 56 members, and Texas, which has varied from 28 to 40 members since its inception in 1986. AJS FEDERAL JUDICIAL SELECTION, *supra* note 324.

be named by the state bar³³⁴ and mechanisms that account for the lack of a senator from the president's party.³³⁵ The panels in Colorado and Washington are bipartisan.³³⁶ In most states the panels provide a slate of names to the senators, but in Colorado it appears that the nominating commission forwards its recommendations directly to the White House.³³⁷ There are also other variations, including Florida's requirement that all application materials be available to the public and that interviews be open to the public.³³⁸

Screening or rating panels, on the other hand, would provide less of a restriction on the president and the home state senators, since these panels would not generate a field of candidates. Screening panels would, however, provide some greater assurance of the U.S. Attorneys' professional experience and reputation,³³⁹ and increasing the visibility of the appointment in the local professional community may strengthen the U.S. Attorney's ability to occasionally resist pressures from Main Justice. The American Bar Association's screening of judicial nominations provides one model that could be adapted to the nomination of U.S. Attorneys.³⁴⁰

The use of screening or nomination panels has another advantage: they can be (and have been) employed in individual districts without any legislative authorization.³⁴¹ This is consistent with the approach advocated here of allowing variations among judicial districts, and use in individual districts can provide a

³³⁴ Both Hawaii and Wisconsin provide for members designated by the state bar association, and Wisconsin also includes the dean of one of the state's law schools. *Id.*

³³⁵ Hawaii's charter provides that when neither senator is a member of the president's party, the panel shall consist of eight members: two selected by the state's senior senator, one by the state's junior senator, one by the state bar, and four chosen by the highest ranking member of the president's party. Hawaii Federal Judicial Selection Commission, § 2, *available at* http://www.judicialselection.us/uploads/documents/HI_FJSC_charter_DFA1FE5BF22BE.pdf (last visited Feb. 16, 2009). If, however, the state's senators are from the president's party, the commission expands to nine members, with four chosen by the senior senator, three by the junior senator, and two by the state bar. Wisconsin's commission charter makes provision for three possibilities: both senators of a different party than the president, both of the same party as the president, and one senator from the president's party. Wisconsin Nominating Charter, *supra* note 324.

³³⁶ AJS FEDERAL JUDICIAL SELECTION, *supra* note 324.

³³⁷ *Id.*

³³⁸ Florida Nominating Commission, *supra* note 324, Rule 23.

³³⁹ Upon occasion, U.S. Attorneys with little or no litigation experience have been appointed. *See supra* note 268.

³⁴⁰ For a description of the ABA process, see AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON THE FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS (2007), *available at* http://www.abanet.org/scfedjud/federal_judiciary07.pdf.

³⁴¹ For example, in 2001 the Bush administration and California's two Democratic senators, Dianne Feinstein and Barbara Boxer, agreed to develop a bipartisan selection process for judges and U.S. Attorneys that would avoid protracted nomination fights. *See* Richard B. Schmitt, *Justice Aide Took Lead to Replace Prosecutor*, L.A. TIMES, May 23, 2007, at 1, *available at* 2007 WLNR 9647884 (describing the commission and Monica Goodling's attempt to circumvent it).

base of experience that might ultimately guide legislation on a national level. In the absence of legislative change, it would be very desirable for more senators to experiment with the use of such panels to assist in the selection of U.S. Attorneys and for scholars to study the operation of the existing panels. Additionally, professional groups, such as the ABA and the American Judicature Society, should consider recommending legislation to require the use of either nominating or screening panels.

3. Regulating contact between individual federal prosecutors and political actors

Regardless of the system of appointing U.S. Attorneys, renewed attention should be given to regulating the contacts between the U.S. Attorney (and their staffs) and various political actors, both within and outside of the administration in which they serve. Since the post-Watergate period, the Department has had internal regulations intended to insulate its decision making from improper influences. The regulations have become less stringent in some respects over time, and there is evidence that, in at least one significant case, they were not followed. More attention should be given to three issues: the persons within the Department who are authorized to speak to representatives of the White House and Congress concerning individual investigations and cases, the permissible nature of those conversations, and the mechanisms to ensure that the new standards are followed.

For at least thirty years, the Department has had internal regulations that imposed limitation on communications with the White House and Congress.³⁴² These regulations are intended to insulate the U.S. Attorneys (and others) from influences that should not affect decisions in particular criminal or civil cases, to preserve the Department's independence, and to prevent even the appearance of conflicts of interest.³⁴³ It is difficult to track the applicable policy precisely throughout the period in question, because it was incorporated into various versions of the U.S. Attorneys' Manual but also supplemented by a series of letters

³⁴² I have not been able to locate the original policy. The U.S. Attorneys' Manual from 1984 states that it is announcing and restating a policy announced in 1978. See *infra* note 343.

³⁴³ USAM, *supra* note 26, at § 1-8.200 provided:

The Assistant Attorneys General, the U.S. Attorneys and the heads of the investigative agencies in the Department . . . must be insulated from influences that should not affect decisions in particular criminal or civil cases. To ensure that this occurs, to continue the independence of the Department of Justice, to prevent even the appearance of conflicts of interest and to provide for the most efficient and effective system of proper communications with outside parties, specific procedures must be provided to regulate communication concerning pending cases. Consequently, the following paragraphs restate and clarify the procedures initially announced in 1978.

A. All inquiries and information concerning pending investigations, matters or cases from either the White House Staff or the Congress should be directed to the Offices of the Attorney General, the Deputy Attorney General, or the Associate Attorney General. . . .

and memoranda from the Attorneys General. Oversight hearings in the Senate revealed that at least from 1993 to 2002 the Attorney General's written policy stringently limited contact between the White House and the Department concerning individual cases.³⁴⁴ Initial communications were authorized for only seven individuals: the Attorney General, Deputy Attorney General, Associate Attorney General, the President, Vice President, White House Counsel, and Deputy White House Counsel.³⁴⁵ During the Bush Administration, however, successive revisions greatly expanded the group of individuals authorized to communicate concerning individual cases, first to 417 individuals in the White House and 42 in the Department, and later to 895 people in the White House and 42 in the Department.³⁴⁶ On the Congressional side, the United States Attorneys' Manual now provides that any Congressional inquiry to a U.S. Attorney seeking non-public information about individual cases must be referred to a designated congressional liaison, which is presently the counsel to the director of the Executive Office of United States Attorneys.³⁴⁷

The new policies reflected the perception that limiting contact to only the senior Department leadership would create a bottleneck, and that such a bottleneck was especially problematic following 9/11.³⁴⁸ On the other hand, the relaxed policies allowed hundreds of individuals within Congress and the Executive Branch, whose duties are primarily or exclusively political, to have greater access to and contact with individuals who are making prosecutorial decisions. They also allowed contacts at a lower level within the Department. This can create the appearance of impropriety, undermining public confidence in the neutrality and impartiality of federal prosecutions. It also increases the difficulty of making nuanced determinations about the propriety of providing information in individual cases.

Because the Department's publications were not amended to reflect the change in policy, these changes came to light only as a result of multiple inquiries in the course of Congressional oversight hearings. Concern about the extent to

³⁴⁴ See S. Rep. No. 110-203, at 2–6 (2007) (describing hearings and findings); *id.* at 13–19 (reproducing letter and memoranda from Attorneys General in 1994, 2002, and 2006). The 2006 memoranda were not incorporated into the published ORGANIZATIONS AND FUNCTIONS MANUAL. *Id.* at 3. See U.S. DEP'T OF JUSTICE, ORGANIZATION AND FUNCTIONS MANUAL, § 32(1) (1998), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title1/doj00032.htm.

³⁴⁵ See S. REP. NO. 110-203, *supra* note 344, at 2.

³⁴⁶ *Id.* at 2–3, 14–19.

³⁴⁷ USAM, *supra* note 26, at § 1-8.001 to .030, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title1/8mdoj.htm (last visited Dec. 11, 2008).

³⁴⁸ See The Role of the Department of Justice, <http://www.acslaw.org/node/5208> (July 2007) (last visited on December 11, 2008) (video and transcript of an ACS National Convention Panel examining the historical relationship between the Justice Department, including statements by former Deputy Attorney General Jamie Gorelick describing restrictive policy during the Clinton administration, and statements by Gorelick and Viet Dinh that policy changed in Bush administration, particularly following 9/11).

which disclosures were being permitted led the Senate Judiciary Committee to approve a bill that would require semi-annual reports to Congress describing which Department of Justice and White House personnel had communications regarding ongoing Departmental investigations or cases.³⁴⁹ Shortly thereafter, Attorney General Mukasey issued a new policy that limited initial communications regarding any specific criminal or civil matter to four individuals: the Attorney General, the Deputy Attorney General, the Counsel to the President, and the Deputy Counsel to the President.³⁵⁰

The problems noted in Parts I and II suggest the importance of tight controls on communications between those charged with making prosecutorial decisions in federal cases and those in Congress and the White House whose roles are political. Contacts should be limited to a smaller group of individuals who have significant stature and experience. The Mukasey memorandum reinstitutes tight controls on communications by the White House as a matter of internal Departmental policy. It is unclear whether further safeguards are needed, given the unannounced amendment of the governing policy during the Bush administration. Moreover, at this point it appears that the controls on the Congressional side of the equation may also deserve attention. The director of the Executive Office of U.S. Attorneys is not a presidential appointee, nor is the counsel to the director. Authorizing Congressional contacts at this level of the Department for communications concerning individual investigations or prosecutions is quite different than channeling all contacts through the senior leadership. It may also be possible to be more specific about the nature of the communications that are subject to limitations. For example, imposing restrictions only on initial communications seems to leave the door open for problems.

But whatever policy is adopted, it must be followed to be effective. U.S. Attorney David Iglesias conceded that he did not report the calls he received from his senator and congresswoman, despite the fact that he felt they were improper.³⁵¹ Perhaps Iglesias' failure to comply with the policy was very unusual, but it suggests the desirability of enhancing efforts to publicize the policy within the Department and stress the importance of compliance.³⁵² The question whether the idea of a statutory reporting requirement has merit turns on a determination of whether the problems encountered during the Bush administration were *sui generis*, or reflect a need for continuous oversight.³⁵³

³⁴⁹ See S. 1845, 110th Cong., 1st Sess. (2007), and S. Rep. 110-203, *supra* note 344, at 7.

³⁵⁰ Memorandum from Michael Mukasey, Attorney General, to Heads of Department Components and United States Attorneys 2 (December 19, 2007) (on file with the Ohio State Journal of Criminal Law).

³⁵¹ See *supra* text accompanying note 27.

³⁵² Cf. Memorandum from Michael Mukasey, Attorney General, *supra* note 350 (stating that one function of the memorandum was to "ensure that everyone is aware of the rules and their importance").

³⁵³ If a statutory reporting requirement were enacted, it would need to provide a mechanism to avoid making public sensitive information regarding ongoing investigations. See S. REP. NO. 110-

4. Clarifying (and perhaps restricting) the scope of political corruption offenses

Mechanisms that modulate political pressure and contact will be beneficial, but attention should also be given to the other aspect of the problem that was highlighted in the prosecutions of Georgia Thompson and former Governor Seigelman.³⁵⁴ The breadth and elasticity of the federal offenses used to prosecute state and local corruption enhance the scope of federal law and, accordingly, also enhance the scope of prosecutorial discretion. There is much less dispute about the propriety of a federal prosecution that is based upon a corrupt *quid pro quo*, and the decision to bring such a prosecution is generally based solely on the strength of the evidence. In the case of the more amorphous argument that a state or local official deprived the citizens of his or her honest services, however, the prosecutor is not merely assessing the strength of the evidence, but in many cases is also seeking to expand the definition of the conduct that constitutes a crime. It is easy to see why prosecutions of the latter sort generate claims of unfairness when the defendants are members of the party that does not control the executive branch, and hence the power of prosecution.

The question whether (and how) to redefine the offenses of mail fraud, wire fraud, and federal program bribery falls outside the scope of this article, but it is clearly one important piece of the puzzle that should be reexamined. Legislation defining the offenses in question more clearly would be desirable, but it is not the only way to achieve greater clarity about the scope of these offenses. Because of the importance of providing clear standards in this context, this might be an appropriate topic for uniform national standards spelled out in the U.S. Attorneys Manual.³⁵⁵ It would be particularly helpful if the Manual addressed and provided guidance on the exercise of prosecutorial discretion in the use of broad amorphous offenses, such as mail fraud, in the specific context of public corruption offenses where the Manual might address, for example, the question whether a *quid pro quo* is required. One problem with this approach is that provisions in the U.S. Attorneys Manual are not ordinarily judicially enforceable.³⁵⁶

203, *supra* note 344, at 11 (minority view of Sen. Kyl).

³⁵⁴ See *supra* text accompanying notes 83–122.

³⁵⁵ Dan Kahan has gone further, advocating that Congress formally delegate interpretive authority to the Department of Justice, “whose reasonable, pre-litigation interpretations of vaguely worded criminal statutes would be binding on the courts” under a *Chevron* regime. See Dan M. Kahan, *Reallocating Interpretative Criminal-Lawmaking Power Within the Executive Branch*, 61 L. & CONTEMP. PROBS. 47, 53–54 (1998).

³⁵⁶ See Ellen S. Podgor, *Department of Justice Guidelines: Balancing “Discretionary Justice,”* 13 CORNELL J.L. & PUB. POL’Y 167, 175–85 (2003) (describing cases holding that defendants may not enforce various Department of Justice guidelines). See also *id.* at 196 (arguing that courts should allow defendants to use violations of internal guidelines as evidence of prosecutorial misconduct and require prosecutors who did not comply with departmental guidelines to bear the burden of showing they did not engage in misconduct).

IV. CONCLUSION

The principal responsibility for federal prosecutions in each federal judicial district should remain in the hands of a presidential appointee who has been confirmed by the Senate. To be sure, as Part I demonstrates, some serious problems occurred during the Bush Administration, and other charges remain under review. Moreover, these problems are not unique to one administration. But as noted in Part III, measures can be taken to modulate or block pressures that might distort the U.S. Attorney's decision making in individual cases. Those measures are preferable to converting the position of U.S. Attorney to a career civil service role. The Department's current two-level structure and its very large number of presidential appointees are anomalous, but they serve important functions: increasing the effectiveness of the U.S. Attorneys as the chief law enforcement officer in each district, and preserving the local orientation of federal criminal law enforcement.

